TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[redacted] 1924

No. [redacted] 175

SANFORD & BROOKS CO., APPELLANT,

vs.

UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED SEPTEMBER 30, 1925

(28,870)

(29,870)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 560

SANFORD & BROOKS CO., APPELLANT,

vs.

UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1923

[fol. 1] IN THE

COURT OF CLAIMS

No. 95-A

SANFORD & BROOKS CO.

vs.

UNITED STATES

I. PETITION—Filed April 28, 1921

To the Honorable the United States Court of Claims your petitioner respectfully shows:

I. The plaintiff, the Sanford & Brooks Co., is a corporation organized and existing under the laws of the State of Maryland.

II. On July 9, 1914, the defendant advertised for bids and issued specifications for dredging in Broad Creek, Maryland, stating that bids would be received at the United States Engineer Office at Baltimore, Md., until 2:30 P. M., July 24, 1914. The plaintiff applied to the said office for information, was furnished with a copy of the specifications and drawings and told that the line of the proposed work was indicated upon the site of the work by stakes.

III. The specifications provided as follows:

18. Location, etc. The dredging for which provision is made in these specifications is in Broad Creek, Md., a waterway connecting [fol. 2] Little Annemessex River, in the vicinity of Crisfield, Md., with Pocomoke Sound. The project is for a channel 6 feet deep at mean low water, 100 feet wide in the straight reaches and 130 feet wide at the bends. The depth of cutting may vary from nothing to 8 feet. The tide has a range of about 2 feet.

"19. Maps. The work shall conform to map marked "Broad Creek, Maryland, from Pocomoke Sound to Little Annemessex River, January 16, 1911," which forms a part of the specifications, and which is filed in the United States Engineer Office at Baltimore, Md.

"20. Work to Be Done. It is proposed to dredge a channel 100 feet wide in the straight reaches and 130 feet wide in the bends and 6 feet deep at mean low water. The length of the channel to be dredged is about 2 miles. Subject to the right reserved in paragraph 4 hereof, award will be made for all the work to one bidder.

"21. The total estimated quantity of material to be removed from within the specified limits, exclusive of allowable overdepth, to complete the work to be done as stated in paragraph 20 is 190,000 cubic yards, place measurement, and this amount will be used as a basis in canvassing bids. Within the limits of available funds the United States reserves the right to require the removal of such yardage as will complete the work described in paragraph 20, be it more or

less than the quantity above estimated, and final payment will not be made until the work is so completed.

"22. The material to be removed is believed to be mud and sand, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

"23. The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered except ledge rock. The removal of ledge rock, if found, will not be re- [fol. 3] quired; such work, if necessary, will be made the subject of separate contracts."

IV. The plaintiff's agent went upon the site of the work, but was unable to definitely locate the lines thereof, because the stakes that had once marked the lines thereof had in most instances been lost or destroyed. A superficial examination was made, but nothing definite could be arrived at as to the character of the material because the channel itself could not be located.

V. Relying upon the statements in the specifications as to what was believed to be the character of the materials to be excavated, the plaintiff bid upon the work, was awarded the work and entered into a formal contract for the execution thereof dated the 31st day of July, 1914, which is attached hereto marked Exhibit A together with the specifications and drawing by reference made a part of the contract marke*t* respectively Exhibit B and Exhibit C.

VI. The specifications provide:

"30. Order of Work. The work is to be carried on at such localities and also in such order of precedence as may be found necessary by the contracting officer. The location and limits of the work to be done will be plainly indicated by the contracting officer or his agents by stakes and ranges or otherwise. The contractor may be required to suspend dredging at any time when for any reason the gauges or ranges cannot be seen or properly followed."

[fol. 4] The contractor placed a plant at the site of the work which was adequate and proper for the completion of the work in such material as was indicated in the specifications within the area specified and within the time limit.

The contractor began work on the 16th day of November, 1914, at the place and upon the lines designated and laid down by the contracting officer through his agents. The contractor proceeded with the work as laid out, but found that the material to be dredged was not mud and sand, but a dense clay that was much more difficult to excavate by hydraulic appliances such as the contractor had upon the work and which were adequate and proper for the excavation of mud and sand. About the 18th day of December, 1914, after the contractor had been at work for over a month along the lines designated it was noticed that the excavation being conducted was not within the area indicated upon the contract drawings. This

was called to the attention of the contracting officer who decided that an error in the location of the work had been made by the government agent but that it was impracticable to abandon the work in the location in which the contractor had been working, and to relocate the channel in accordance with the contract. Over the protest of the contractor the engineer directed that the work proceed along the wrong location until such point as it coincided with the location as laid down in the contract and thence upon the proper location.

The contractor proceeded with the excavation as directed by the engineer outside of the contract lines until about the 15th day of May, 1915. The distance that the contractor dredged outside of the contract lines was about 1,750 feet.

Throughout the location of the channel as originally planned in this area the material was of a character near to that indicated in the specification, i. e., mud and sand. The error in location of the channel threw the excavation into a much deeper cut and into dense hard clay.

[fol. 5] The plaintiff protested from time to time as to the location of the channel and character of the material he was required to excavate. Upon the completion of the work outside of the contract, the contractor was granted an extension of time for the completion of the whole contract of fifty-eight days, because of the added difficulty in excavating the material upon the erroneous location.

During the time occupied in the work outside and inside the contract limits the plaintiff demanded payment for the work outside the contract limits upon a fair basis, that is upon quantum meruit. This claim was urged and December 18, 1915, was finally passed upon by E. H. Crowder, Judge Advocate General of the United States Army, who found as follows:

"I do not think that this change can be considered as a minor change, which the engineer officer is authorized to make under the terms of the contract, and therefore am of opinion that this work must be regarded as not covered by the contract, and that, therefore, the contractor is entitled to a quantum meruit compensation for the same. In determining this compensation the sole question is as to the value of the work, in view of the time consumed therein as affected by the material encountered. In making this determination it is not proper to consider that the effect of the change was to release the contractor from the work on the line A—B, which he might have been required to perform, although more difficult than represented in the specifications. This being extra work and not covered by the contract, the sole questions to be determined is that of a fair compensation for its performance. If this view be approved, I think the papers should be returned with a view to an agreement with the contractor as to a fair compensation for the dredging of the channel X—B."

[fol. 6] Plaintiff has, however, not been paid for the work outside of the contract anything but the contract price per cubic yard excavated, that is 7.9 cents per cubic yard.

The contractor was engaged in work outside of the contract limits one hundred and fifty-three (153) days. During that time, he made the following expenditures for the work on the channel:

(a) Towing and fresh water	$2,555.30
Coal	2,364.93
Payroll	3,638.57
Operating expenses	5,358.43
Supervision	1,265.74
	$15,182.97

The plaintiff had employed upon the work outside the contract limits the following equipment and the fair rental value thereof is as shown below:

(b) 12-inch hydraulic dredge "Deposit" centrifugal type with cutter attachment.	
17 pontoons.	
1,500 ft. Spiral riveted Asphalt pipe, 153 days at $30 per day	4,590.00
Clamshell dredge Dixon and two scows, 78 days at $30 per day	2,340.00
Total	$6,930.00
Overhead and profit on (a) and (b) at 15 per cent	3,316.95
Total for work including profit	25,429.92
Less amount received from U. S. for work outside contract limits	2,972.74
Balance due and unpaid	$22,502.18

[fol. 7] VII. Plaintiff avers that the statement in specifications that "the material to be removed is believed to be mud and sand" was not true, in fact, that at the time of making said statement and representation the defendant and its agents had no indication regarding the character of the material to be removed which they themselves considered sufficient to form the basis of any such belief and therefore knew that they could do no more than indulge in a mere guess in regard thereto, and the plaintiff further, in fact says, that if any examination of the materials to be removed had been made by the defendant, such as would be sufficient to enable them to form any belief as to the character of the material to be removed, the fact must inevitably have been disclosed that the material to be removed was not mud and sand but dense clay, far more difficult and expensive to dredge than mud and sand.

VIII. The plaintiff began work within the contract lines on the 16th day of May and completed the work on the — day of ——. 19—. The material encountered throughout in the prosecution of

the work within the contract line was only in a small degree mud and sand as stated to be the belief of the defendant in the specifications, but was mostly dense clay, interspersed with stumps. The contractor placed an hydraulic dredge equipped with a cutter upon the work. This dredge was a usual and proper dredge for work in mud and sand, and of adequate capacity for the completion of the excavation required in mud and sand within the contract period.

The dredge furnished for the work was not of a character to be employed economically in the kind of the material found. The con- [fol. 8] tractor was compelled to furnish other and different equipment due to the character of the material at great expense to itself.

It was much more difficult and expensive to excavate the materials found than it would have been to excavate the materials described in the specifications.

The cost of the work done by the contractor is shown as follows:

Towing and fresh water	$6,194.70
Coal	5,733.17
Pay roll	8,820.77
General operating expense, repairs to plant, supplies, insurance, etc.	12,990.12
Supervision	3,934.36
	$37,675.02
Use of plant:	
Deposit and equipment 447 days at $30 per day	$13,410.00
Dixon and scows 113 days at $30 per day	3,390.00
	$54,473.02

A charge of 15 per cent on the above amount for overhead, profit, etc., is $8,170.95, making the total of $62,643.97. The amount received by the contractor for the work was $15,517.99.

The difference between the cost of the work with overhead and profit allowed and the amount received for the work is $47,125.98.

IX. No assignment or transfer of this claim and no other person or corporation has any interest therein except the subcontractor Dorsey [fol. 9] & Miller Company whose rights were acquired as a subcontractor under their contract with the plaintiff for the execution of the work.

X. The plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government.

XI. The plaintiff, therefore, claims as follows:

1. For the material excavated outside of the contract lines	$22,502.18
2. Difference between the cost of excavation within the contract lines and the amounts paid the contractor..	47,125.98
3. Profit that plaintiff would have made upon the work done within the area shown upon the original contract if the work had been in mud and sand.....	2,217.56
Total	$71,845.72

The plaintiff is justly entitled to the amount above claimed after allowing all just credits and offsets.

Wherefore your plaintiff prays judgment for $71,845.72.
Sanford & Brooks Co., By W. B. Brooks, President. Horace S. Whitman, Attorney. William L. Marbury, Charles Clagett, Of Counsel.

[fol. 10] Jurat showing the foregoing was duly sworn to by W. B. Brooks, omitted in printing.

[fol. 11] EXHIBIT A TO PETITION

Improving Broad Creek, Md.

War Department

Advertisement

U. S. Engineer Office, Room 309, Custom House, Baltimore, Md.

July 9, 1914.

Sealed proposals for dredging in Broad Creek, Maryland, will be received at this office until 2.30 o'clock P. M., July 24, 1914, and then publicly opened. Information on application.

Lansing H. Beach, Colonel, Engineers.

General Specifications

1. Guaranty.—No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. Bids in Triplicate.—All bids and guaranties must be made in triplicate upon printed forms to be obtained at this office.

3. Liability of Guarantors.—Each individual guarantor will justfy in the sum of $6,000. The liability of the guarantors and bidder

is determined by the Act of March 3, 1883 (22 Statutes, 487, Chap. 120), and is expressed in the guaranty attached to the bid.

[fol. 12] 4. Contract and Bond.—The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved bond, in an amount approximately equal to and not less than fifty (50) per cent. of the estimated amount of the contract within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which may be inspected at this office, and will be furnished, if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract. The right is reserved to reject any or all bids, and to waive any informalities in the bids received.

5. Address.—The proposals and guaranties must be placed in a sealed envelope marked "Proposal for dredging in Broad Creek, Maryland, to be opened July 24, 1914," and enclosed in another sealed envelope addressed to Colonel Lansing H. Beach, Corps of Engineers, U. S. A., Room 309, Custom House, Baltimore, Md., but otherwise unmarked. (Note.—It is suggested that the inner envelope be sealed with sealing wax.)

6. Definition of Terms.—Whenever the term "contracting officer" is used in the specifications it is understood to refer to the officer of the Corps of Engineers, U. S. Army, in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. Quantities Approximate.—It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance [fol. 13] will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. Errors and Omissions.—The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. Contractor's Responsibility.—It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant and materials, and for any damage or injury done by or to them, from any source or cause.

10. Convict Labor.—In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprison-

ment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. Objectionable Employees.—The contractor will be required to discharge any employee who, in the opinion of the contracting officer, is objectionable or incompetent. This requirement shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. Contractor to Be Present or Represented.—The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, to be designated in writing by the contractor, who shall be clothed with full authority to act for him in all cases, and to carry out any instructions relative to the work which may be given by the contracting officer, either personally or through an authorized representative.

13. Sundays, Holidays, and Nights.—No work shall be done on Sundays or on days declared by Congress as holidays for per diem employees of the United States, except in cases of emergency, and then only with the written consent of the contracting officer; nor [fol. 14] shall any work be done at night unless authorized in writing by the contracting officer.

14. Eight-Hour Laws.—The attention of bidders is called to the Acts of Congress approved August 1, 1892, June 19, 1912, and March 3, 1913, limiting the hours of daily service of certain classes of persons defined in the acts, upon work covered by contracts with the United States. Copies of these acts may be obtained at this office. All bidders are advised that the provisions and stipulations of such of these acts as apply to the work covered by these specifications will be considered as included in any contract entered into under these specifications, and that violations of the Act of August 1, 1892, or the Act of March 3, 1913, will be reported by the officers of the War Department for such action as the Department of Justice may deem it proper to take, and violations of the Act of June 19, 1912, will be reported by any officer or person designated as inspector of the work to be performed under these specifications, to the proper officer, as directed in the Act.

15. Commencement, Prosecution, and Completion.—The contractor will be required to commence work under the contract within thirty (30) days after the date of receipt by him of notification of approval of the contract by the Chief of Engineers, United States Army, unless a later date for commencement is authorized in writing by the contracting officer as herein provided for; to prosecute the said work with faithfulness and energy, and to complete it within five (5) months after the limiting date fixed for commencement; provided, that should the total quantity of material to be paid for actually removed under the contract exceed the estimated quantity as stated in paragraph 21 of these specifications, additional time will be allowed at the rate of one (1) month for each 40,000 cubic

yards in excess of such estimated quantity; and provided further, that should the award be made to a contractor whose plant is engaged in work for the United States which will not be completed in [fol. 15] time to permit work under this contract to be begun within the time specified, the time limit for commencement under this contract may be extended in writing by the contracting officer not more than three (3) months, with a corresponding extension of the time limit for completion.

16. Sufficiency of Time.—The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, unless extraordinary and unforeseeable conditions supervene.

If, at any time after the date fixed for beginning work, it shall be found that operations are not being carried on at the prescribed rate or at a rate sufficient in the opinion of the contracting officer to secure completion within the contract time, the contracting officer shall have the power, after 10 days' notice in writing to the contractor, to put on such additional labor or plant, or to purchase such materials as may be necessary to put the work in a proper state of advancement, and any actual final excess cost thereof to the United States over what the work would have cost at the contract rate, after crediting the contractor with the value to the United States (as determined by the contracting office) of the remaining plant and unused materials so purchased, shall be deducted from any sums due or to become due the contractor. The right is reserved to the United States to assume the capacity of the plant and force actually on the work at any time as a measure of probable progress thereafter.

The provisions of this paragraph, however, shall not be construed to affect the right of the United States to annul the contract, as provided for in the contract form; nor shall any failure of the contracting officer to take action under this paragraph or to annul the contract, in case the contractor fails to make the specified rate of progress during any month or any series of consecutive months, be construed as a waiver of the right of the United States to re- [fol. 16] quire the contractor to make good the deficiency in future months, or to take further action under this paragraph, or to later annul the contract if the deficiency is not made up within a reasonable time.

17. Payments.—Payments will be made monthly on estimates of work performed and accepted during the preceding month. A percentage of ten (10) per centum will be reserved from each payment until completion and acceptance of the work covered by the contract.

Detailed Specifications

I. Description of the Site and Work

18. Location, etc.—The dredging for which provision is made in these specifications is in Broad Creek, Md., a waterway connecting

Little Annemessex River, in the vicinity of Crisfield, Md., with Pocomoke Sound. The project is for a channel 6 feet deep at mean low water, 100 feet wide in the straight reaches and 130 feet wide at the bends. The depth of cutting may vary from nothing to 8 feet. The tide has a range of about 2 feet.

19. Maps.—The work shall conform to map marked "Broad Creek, Maryland, from Pocomoke Sound to Little Annemessex River, January 16, 1911," which forms a part of the specifications, and which is filed in the United States Engineer Office at Baltimore, Md.

20. Work to Be Done.—It is proposed to dredge a channel 100 feet wide in the straight reaches and 130 feet wide in the bends and 6 feet deep at mean low water. The length of the channel to be dredged is about 2 miles. Subject to the right reserved in paragraph 4 hereof, award will be made for all the work to one bidder.

II. Quantity of Material

21. The total estimated quantity of material to be removed from within the specified limits, exclusive of allowable overdepth, to [fol. 17] complete the work to be done as stated in paragraph 20 is 190,000 cubic yards, place measurement, and this amount will be used as a basis in canvassing bids. Within the limits of available funds the United States reesrves the right to require the removal of such yardage as will complete the work described in paragraph 20, be it more or less than the quantity above estimated, and final payment will not be made until the work is so completed.

III. Character of Material

22. The material to be removed is believed to be mud and sand, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

23. The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered except ledge rock. The removal of ledge rock, if found, will not be required; such work, if necessary, will be made the subject of separate contracts.

IV. Measurement

24. The material removed will be measured by the cubic yard in place by means of soundings taken before and after dredging. The maps already prepared, which will be exhibited to intending bidders (pag. 19), are believed to represent accurately the existing conditions; but they will be verified and corrected, if necessary, by soundings taken shortly before dredging is begun in any locality. Soundings will be made behind the dredge as the work progresses, the contractor will be advised of the result of these soundings, and monthly deductions for overdepth dredging (par. 27) and monthly

payments for approximate net results will be based upon these soundings.

[fol. 18] 25. As soon as practicable after the completion of such established subdivisions as will not be injuriously affected by work on other subdivisions, the area dredged will be thoroughly examined by sounding as well as by sweeping if deemed advisable by the contracting officer, and should any lumps, ridges, shoal, or other lack of contract depths be disclosed by this examination the contractor will be required to level them off by dragging the bottom or to remove them by dredging, as may be required by the contracting officer. The contractor or his authorized representative on the work will be notified whenever soundings are to be made and will be permitted to accompany the sounding party. When the entire area or the area of any of the specified subdivisions is thus found to be in satisfactory condition the work thereon will be finally accepted and final estimates will then be made thereon based entirely on the difference between the last soundings made before dredging and the results of the last examination, subject to proper deductions or corrections of deductions already made on account of dredging outside specified limits or for overdepth dredging (par. 27), and such deductions or corrections of deductions will be included in the next monthly estimates; and the matter will not thereafter be reopened except on evidence of collusion, fraud, or obvious error. The acceptance of a completed subdivision shall not change the time of payment of the retained percentages from the whole or any part of the work as stated in paragraph 27.

26. Should the last examination of the contract work, extended to include the entire area, show shoaling since the previous season's work, or shoaling for which the contractor is evidently not responsible, redredging at the contract price, so far as permitted by available funds, may be done if agreeable to both the contractor and the contracting officer.

27. Overdepth Dredging, Shoaling, and Side Slopes.—To cover mechanical inaccuracies of dredging processes, material actually re- [fol. 19] moved to a depth of not more than one foot below the required depth will be estimated and paid for at full contract price; to secure stable banks for the dredged cut, material which is actually removed on order of the contracting officer in quantities sufficient to make side slopes, not flatter than one on three, whether dredged in situ or after having fallen into the cut, will be estimated and paid for. The allowance for overdepth on the side slopes will be the same as in the channel, and will be measured vertically. Material taken from beyond the limits above described will be deducted from the estimates as excessive overdepth dredging and will not be paid for.

28. When necessary for any cause to convert "place measurement" into "scow measurement," or the reverse, five yards of the former will be taken as the equivalent of six yards of the latter.

V. Conduct of Work

29. Disposal of Excavated Material.—The material excavated must be deposited on shore on either side of the channel at such points as may be designated by the contracting officer, and where it cannot return to the navigable waters of the United States. The necessary right of way for disposition of dredged material has been transferred to the United States.

Any material that is deposited elsewhere than in places designated or approved by the contracting officer will not be paid for, and the contractor may be required to redredge such material and deposit it where directed.

In case the material is deposited behind bulkheads constructed in shoal water or at the water's edge, all embankments or bulkheads needed for confining and grading the material, with necessary waste weirs, must be provided and maintained by the contractor without expense to the United States.

[fol. 20] 30. Order of Work.—The work is to be carried on at such localities and also in such order of precedence as may be found necessary by the contracting officer. The location and limits of the work to be done will be plainly indicated by the contracting officer or his agents by stakes and ranges or otherwise. The contractor may be required to suspend dredging at any time when for any reason the gauges or ranges cannot be seen or properly followed.

31. Lights.—The contractor shall keep proper lights each night between the hours of sunset and sunrise, upon all floating plant connected with the work, upon all ranges and other stakes in connection with it, when necessary, and upon all buoys of such size and in such locations as to endanger or obstruct navigation, and shall be responsible for all damages resulting from any neglect or failure in this respect. If work at night is permitted by the contracting officer (see par. 13), the contractor shall maintain, from sunset to sunrise, such lights on or about his plant as the contracting officer may deem necessary for the proper observation of the dredging operations.

32. Obstructions.—The United States will not undertake to keep the channel free from vessels or other obstructions except to the extent of such regulations, if any, as may be prescribed by the Secretary of War, in accordance with the provisions of section 11 of the river and harbor act approved June 13, 1902. The contractor will be required to conduct the work in such manner as to obstruct navigation as little as possible, and in case the contractor's plant so obstructs the channel as to make difficult or endanger the passage of vessels, it shall be promptly moved on the approach of any vessel to such an extent as may be necessary to afford a practicable passage. Upon the completion of the work the contractor shall promptly remove his plant, including ranges, buoys, piles, and other marks [fol. 21] placed by him under the contract in navigable waters.

33. Misplaced Material.—Should the conractor, during the progress of the work, lose, dump, throw overboard, sink, or misplace any material, plant, machinery, or appliance, which in the opinion of the contracting officer may be dangerous to or obstruct navigation, he shall recover and remove the same with the utmost dispatch. The contractor shall give immediate notice, with description and location of such obstructions, to the contracting officer or inspector, and when required shall mark or buoy such obstructions, until the same are removed. Should he refuse, neglect, or delay compliance with the above requirements, such obstructions may be removed by the contracting officer and the cost of such removal may be deducted from any money due or to become due the contractor or may be recovered under his bond.

34. Liability of the Contractor.—The contractor will be responsible that his employees strictly observe the laws of the United States affecting operations under the contract. He will be expected to comply with the laws of the United States and of the States as to the inspection of hulls and boilers, etc., and the licensing of masters, engineers, and other members of the crews of his vessels. He shall conform to such sanitary requirements as may be prescribed by the contracting officer.

VI. Supervision

35. Inspection.—The work will be conducted under the general direction of the contracting officer and will be inspected by inspectors appointed by him, who will enforce a strict compliance with the terms of the contract. The inspectors will keep a record of the work done, and see that the gauges, ranges, and other marks are kept in proper order; but the presence of the inspector shall not relieve the contractor or his responsible agent (see par. 12) of any responsibility for the proper execution of the work. The contractor will be required to facilitate the work of the inspectors in all possible ways [fol. 22] and will furnish, on their request, such boats, boatmen, laborers, and material as may be necessary in inspecting or supervising the work. After the commencement of the dredging all ranges, stakes, gauges, buoys, anchors, and rope needed for the proper execution and inspection of the work will be furnished and maintained in good order by the contractor. When required by the contracting officer or his assistants suitable transportation from all points on shore, designated by the contracting officer, to and from the various pieces of plant and to and from the dumping ground, shall be provided by the contractor. The cost of meeting all the foregoing requirements must be included in the price bid. Except as specified in this paragraph and in paragraph 36, all expense of inspection and superintendence prior to the date fixed for completion of the contract will be borne by the United States.

36. Accommodations and Meals for Inspectors.—The contractor shall furnish regularly to inspectors on board the dredge or other craft upon which they are employed a suitable separate room for

office and sleeping purposes if his plant affords facilities therefor. The room shall be fully equipped and maintained to the satisfaction of contracting officer; it shall be properly heated, ventilated, and lighted, provided with a desk which can be locked and washing conveniences, and shall have a comfortable bed and chair for each inspector. The entire cost to the contractor for furnishing, equipping, and maintaining the foregoing accommodations shall be included in the price bid for dredging.

If the contractor maintains on this work an establishment for the subsistence of his own employees he shall, when required, furnish to inspectors employed on the work, and to all United States agents who may visit the work on official business, meals of a quality satisfactory to the contracting officer. The meals furnished will be paid for by the United States at the rate of twenty (20) cents per person for each meal.

[fol. 23] Each bidder will state in his proposal whether or not his plant will have the facilities for furnishing the accommodations and meals required by this paragraph.

VII. Plant

37. Proposals will state the character and capacity of the plant owned or controlled by the contractor and proposed to be employed by him on the work. The plant shall be of sufficient size to meet the requirements of the work and shall be kept at all times in condition for efficient work, all to be subject to the inspection and approval of the contracting officer. All pipe lines for hydraulic machines must be kept in good condition at all times, and any leaks or breaks along their length must be promptly and properly repaired. No change in the plant employed on the work which shall have the effect of decreasing its capacity below the capacity of the plant named in the proposal shall be made except by written permission of the contracting officer. The measure of the "capacity of the plant" shall be its actual performance on the work to which these specifications apply. The right is reserved to reject the bid of any bidder who cannot show satisfactory evidence of the ownership or control of suitable plant.

VIII. Miscellaneous Provisions

38. Experience.—After the proposals are opened any bidder may be required by the contracting officer to state whether he is now or ever has been engaged on any contract or other work similar to that proposed, the year in which it was done, and the manner of its execution, and to give such other information as will tend to show his ability to prosecute vigorously the work required by these specifications. The proposal of any bidder who does not promptly comply with such a request, or who cannot show to the satisfaction of the contracting officer that he has had sufficient experience to make [fol. 24] it probable that he can sucessfully carry out the proposed contract, may be rejected.

39. Claims and Protests.—If the contractor considers any work required of him to be outside the requirements of the contract or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within three (3) days thereafter or be considered as having accepted the record or ruling.

40. Minor Modifications.—The right is reserved to make such minor changes in the execution of the work to be done under these specifications as, in the judgment of the contracting officer, may be necessary or expedient to carry out the intent of the contract, provided that the unit cost to the contractor of doing the work shall not be increased thereby; and no increase in unit price over the contract rate shall be paid to the contractor on account of such changes. No change which will materially affect the cost of doing the work will be made and no greater or lesser unit price than the contract rate will be paid, except upon formal written agreement between the parties, approved by the Chief of Engineers and the Secretary of War, as provided in the form of contract to be entered into.

IX. Proposal and Contract

41. The proposal form has an entry for each item on which estimates will be given or payments made, and no other allowances of any kind will be made unless specifically provided for in the specifications or the contract or supplemental contracts.

A bid for the entire work must have each blank filed.

The quantities of each item of the proposal as finally ascertained at the close of the contract in the units given, and the unit prices of the several items stated by the bidder in the accepted bid, will determine the total payments to accrue under the contract. The unit [fol. 25] price bid for each item must allow for all collateral or indirect cost connected with it.

Exhibit B to Petition

Contract

Form 19

These articles of agreement entered into this thirty-first day of July, nineteen hundred and fourteen, between Colonel Lansing H. Beach, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and the Sanford & Brooks Co., of the State of Maryland, hereinafter designated as the contractor, of the second part, witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish all the plant, vessels, machinery, tools and appliances and shall perform all the labor necessary for dredging in Broad Creek, Maryland. The said Sanford & Brooks Co. will be paid seven and nine-tenths (7 9-10) cents for each and every cubic yard of material, place measurement, dredged and deposited in accordance with the terms of this contract. The contractor shall furnish to the contracting officer the names and addresses of all subcontractors under this contract, contracting directly with the contractor, together with the character and location of work covered by such subcontracts, the time limits, if any, and the amount of money involved in each subcontract.

Article 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

[fol. 26] Article 3. The contractor shall commence the undertaking covered by this contract as set forth in paragraph fifteen of the attached specifications, and shall prosecute the work, perform the services, and furnish and deliver the materials at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, as set forth in the paragraph of the specifications above cited. Should the contractor fail to make such progress the contracting officer shall have power, after ten days' notice in writing to the contractor, to employ such additional plant or labor, to purchase such materials, and to liquidate such obligations of the contractor, as the contracting officer may deem necessary to put the work in a proper state of advancement, or to insure the proper completion of the undertaking within the time specified; and any excess cost thereof, over what the work, services, or materials would have cost at the contract rate or rates shall be a charge against any sums due or to become due to the contractor, or such excess cost may be recovered from the contractor and his surety or sureties. This provision, however, shall not be construed to affect the right of the United States to take the work out of the hands of the contractor, as provided in Article 4 hereof, and to secure completion of the undertaking by contract or otherwise, in accordance with law. The right is reserved to assume the capacity of the contractor's plant and force on the work, or the past rate of progress and other ascertainable indications of ability and intention to continue or proceed as required, as a measure of probable future progress.

Article 4. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the contracting officer fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the contracting officer shall have power, with the prior sanction of

the Chief of Engineers, to take the work out of the hands of the contractor by giving notice in writing to that effect to the contractor [fol. 27] and his surety or sureties; and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the contracting officer shall have the right to proceed forthwith to secure the delivery of the material, or the performance of the work, by contract or otherwise, in accordance with law; and whatever sums may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the United States in excess of those payable by the United States during the period herein allowed for the completion of the contract by the contractor shall be charged to the contractor, and the United States shall have the right to deduct such excess cost out of or from any money or reserved percentage retained as aforesaid, or to recover the same, or any part thereof, from the contractor and his surety or sureties.

Article 5. If the contractor shall fail to deliver the material or to prosecute the work covered by this contract so as to complete the same within the time agreed upon, then, in lieu of taking the work out of the hands of the contractor as provided in Article 4 of this agreement, the contracting officer, with the prior sanction of the Chief of Engineers, may waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the time limit be thus waived, all expenses for inspection and superintendence after the date fixed for completion, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any [fol. 28] payments due or to become due the contractor: Provided, however, That no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time limit

and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract, nor be construed to prevent action under Article 4 hereof in case the contractor shall fail, in the judgment of the contracting officer, to make reasonable and satisfactory progress after such waiver of the time limit.

Article 6. If, at any time during the life of this contract, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve a material change in the character or quantity of labor or material to be furnished, or in any other provision of the contract, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, or the other provisions thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made [fol. 29] in accordance with such supplemental or modified agreement unless the same was signed and approved before the obligation arising from such modification was incurred.

Article 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

Article 8. The contractor shall be responsible for and pay all liabilities incurred for labor and material in the prosecution of the work.

Article 9. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

Article 10. The contractor shall hold and save the United States, and all officers and agents thereof, harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

Article 11. Payments shall be made to the contractor as prescribed in Article 1 of this agreement, and in paragraph seventeen of the attached specifications.

Article 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer

the United States may refuse to carry out this contract either with [fol. 30] the transferrer or the transferee, but all rights of action for and breach of this contract by the contractor are reserved to the United States.

Article 13. No Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be, admitted to any share or part of this contract, or to any benefit which may arise therefrom; but, under the provisions of section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109), this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

Article 14. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

Article 15. In the performance of this contract, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

*Article 16. In so far as the Act of August 1, 1892, or the Act of March 3, 1913, applies, no laborer or mechanic employed by the contractor or by any subcontractor on the work herein specified, and no person employed to perform services similar to those of laborers and mechanics while directly operating dredging or rock-excavating machinery or tools on the work herein specified, shall be permitted or required to work more than eight hours in any one calendar day except in case of extraordinary emergency.

†Article 17. Subject to the conditions enumerated in section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than [fol. 31] eight hours in any one calendar day upon such work. For each violation of this provision a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any subcontractor.

‡Article 18. The contractor shall furnish to the contracting officer the names and addresses of all subcontractors under this contract,

*Cancel this Article in any contract to which the Act of August 1, 1892, or the Act of March 3, 1913, does not apply.

†Cancel this Article in any contract to which the Act of June 19, 1912, does not apply.

‡Cancel this Article in contracts not for a public work.

contracting directly with the contractor, together with the character and location of work covered by such subcontracts, the time limits, if any, and the amount of money involved in each subcontract.

§Article 19. This contract shall be subject to the approval of the Chief of Engineers, U. S. Army; and such approval, when given, shall relate back to, and be operative from, the date of the execution of the contract.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written, Article — having been canceled with our knowledge and consent, such elimination being hereby agreed to.

Witnesses: Charles R. Sharretts (as to) Lansing H. Beach, Colonel, Corps of Engineers, U. S. A. A. L. Hart (as to) Sanford & Brooks Co., By Wm. H. Taylor, Vice-Pres. (Executed in Triplicate.)

Approved: August 13th, 1914.
Dan C. Kingman, Chief of Engineers, U. S. Army.

[fol. 32] II. General Traverse

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

[fol. 33] III. History of Proceedings

On June 28, 1921, a general traverse was filed under Rule 34.

On July 9, 1921, on motion made therefor by the defendant, the general traverse was withdrawn and a demurrer was filed.

On October 19, 1921, the demurrer was argued and submitted by Mr. Perry W. Howard, for the defendant, and by Mr. Horace S. Whitman, for the plaintiff, and thereupon ordered that the demurrer be overruled without prejudice.

IV. Argument and Submission of Case

On February 14 and February 15, 1923, the case was argued and submitted on merits by Mr. William L. Marbury, for the plaintiff, and by Mr. Barrett F. Brown, for the defendant.

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§Cancel this Article in all emergency contracts.

[fol. 34] VI. **Findings of Fact, Conclusion of law, and Opinion by Hay, J.**—Entered March 19, 1923

This case having been heard by the Court of Claims the court upon the evidence, makes the following

FINDINGS OF FACT

I. The plaintiff, the Sanford and Brooks Co., is a corporation organized and existing under the laws of the State of Maryland, and on July 31, 1914, entered into a contract in writing with Colonel Lansing H. Beach, Corps of Engineers, United States Army, acting for the United States, whereby it agreed to dredge certain materials in Broad Creek, Maryland, and the United States agreed to pay the plaintiff 7 9/10 cents for each cubic yard of material dredged in accordance with the terms of the contract. A copy of said contract marked "Exhibit B," and the specifications and drawing which were a part of said contract marked "Exhibit A and C.," respectively, are made a part hereof by reference.

II. Before executing the contract the plaintiff applied to the defendant for information, and was given such information as the defendant had both with reference to the nature of the materials to be dredged and the location of the work, and was told that the ranges of the various sections of the channel to be dredged had been marked by stakes, said stakes having been placed on the work for the purpose of giving local interests a basis to formulate their deeds, which deeds the government required of them before the project could be begun.

III. The plaintiff began work on November 16, 1914, at the place and upon the lines designed by an inspector of the Government. On December 18, 1914, it was ascertained that the dredging being done was not within the area indicated upon the contract drawings. This was called to the attention of the contracting officer who decided that an error had been made in the location of the work, and he directed that the work proceed along the wrong location until it reached a point which coindcided with the location as laid down in the contract and thence upon the proper location. The amount of material [fol. 35] dredged outside of the contract limits was 28,098 cubic yards. The plaintiff continued the work outside of the contract limits without protest in writing, nor did it make a claim for extra work in accordance with the provisions of the contract, and accepted the contract price for the material dredged outside of the contract limits. The material dredged outside of the contract limits consisted of mud, sand, hard sand, and clay. The plaintiff completed the contract on December 12, 1916, and was paid in full the contract price for the number of cubic yards dredged.

IV. In the bid the plaintiff stipulated a 20-inch dredge with a capacity of about 500 cubic yards per hour in soft mud. The plaintiff placed upon the work a 12-inch plant the maximum capacity of

28,000 — Cu Yds

which was 91 cubic yards per hours. Upon complaint of the defendant of the inefficiency of this plant a clamshell dredge was placed upon the work to faciliate the excavation. There was no requirement in the contract as to the type of dredge to be used on the work. The defendant approved the 12-inch plant first placed upon the work.

V. The specifications stated that the material to be removed was believed to be mud and sand, but that bidders were expected to examine the work and decide for themselves its character and to make their bids accordingly, as the United States did not guarantee the accuracy of the description; and the specifications also provided that the price bid per cubic yard for dredging should cover the cost of removal and disposition of all material encountered except ledge rock.

The plaintiff before it made its bid examined the work and found that the material to be dredged consisted of mud, sand, hard sand, and hard clay, and after making this examination prepared its bid, and entered into the contract whereby it agreed to do the work for 7 9/10 cents per cubic yard. As the work progressed both inside and outside the contract limits the material to be dredged was found to consist of mud, sand, hard sand, and hard clay, with some stumps interspersed.

Conclusion of Law

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover. The petition of the plaintiff is therefore dismissed; and judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Hay, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiff to recover from the United States the sum of about $70,000.

The plaintiff claims that there is due it on account of extra work performed by it outside of the contract limits the sum of about $22,502.18.

[fol. 36] It also claims that by reason of misrepresentations made by the Government as to the material to be dredged it was much more difficult and expensive to excavate the materials found than it would have been to excavate the materials described in the specifications; and that by reason of the misrepresentations of the Government the plaintiff was obliged to expend the sum of $17,127.98 more than it would have expended had the material been such as was described in the specifications. The plaintiff alleges that it relied upon the statement in the specifications as to the character of the material to be dredged and that it was induced to enter into the contract to dredge the material at the price of 7 9/10 cents per cubic yard by the description of the material contained in the specifications.

The contract provides: "Article 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or material shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers."

The extra work which the plaintiff alleges it performed was not required in writing by the contracting officer, nor were the price and quantity of the work approved by the Chief of Engineers. The plaintiff had under the contract a method pointed out to it by which it could have been paid for any extra work which it might have performed. It ignored the provisions of the contract, and continued to perform what it alleged to be extra work and to accept without written protest the contract price therefor; for article 39 of the specifications, a part of the contract, provided: "If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspector or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within three (3) days thereafter or be considered as having accepted the record or ruling." So when the contracting officer directed the contractor to dredge along lines outside the contract limits, if it considered that ruling unfair to it the contract provided a remedy and a method by which it could have saved its rights, but the plaintiff did not proceed in accordance with the provisions of the contract, whether as to extra work, which it alleges it performed, or as to the conduct of the work which the plaintiff alleges led to the performance of the extra work. Under these circumstances the plaintiff can not recover for the extra work which it alleges it has performed. Plumley v. United States, 226 U. S. 545; Daly and Hannan Dredging Co. v. United States, 55 Ct. Cls. 1.

We come next to consider the claim of the plaintiff that it relies upon the statement of the Government that the material to be dredged was mud and sand, and that so relying it was induced to make its bid and to enter into the contract; that it was found that the material to be dredged was not only mud and sand, but also hard sand and hard clay interspersed with stumps, which were very different from mud and sand, and much more expensive to excavate; and it [fol. 37] claims that it should be paid a larger amount than the contract price for the material dredged by it.

The specifications as to the character of the material to be dredged are as follows:

"22. The material to be removed is believed to be mud and sand, but bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

"23. The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered except ledge rock. The removal of ledge rock, if found, will not be required; such work, if necessary, will be made the subject of separate contracts."

It is not alleged or proven that the United States or its officers had knowledge of this material which it failed to disclose to bidders, nor that the United States or its officers had any more knowledge of the material to be dredged than was stated in the specifications. Indeed, it is admitted that the United States had no knowledge of the character of the material to be dredged, and it is asserted that having no knowledge the United States had no right to state its belief as to the character of the material, and that by doing so the Government made itself liable to the plaintiff because when the material came to be dredged it turned out to be not mud and sand, but material more difficult, and therefore more expensive to excavate.

As a matter of fact the evidence in this case discloses that the plaintiff did not rely upon the statements of the United States as to what the material was or was believed to be. The plaintiff, before making its bid and before entering into the contract went upon the site of the work and made its own investigation and ascertained that the material consisted of mud and sand, hard clay, and hard sand. Therefore with its eyes open and with full knowledge of the character of the material to be dredged it made its bid and entered into the contract, and with full knowledge that if there was any other material there except ledge rock it could only receive the contract price for its removal, the contract providing "the price bid per cubic yard for dredging shall cover the cost of removal and disposition of all materials encountered except ledge rock."

In the face of the above facts the plaintiff can not be allowed to found a claim against the Government upon the statement that it relied upon the specifications to determine the character of the material to be dredged. The belief as to the character of the material set out in the specifications is not a warranty upon which an action can be found; it is only an expression of opinion. If the opinion set out in the specifications had been known to be false by the officers of the United States, and had been so set out with intent to deceive and mislead, a different conclusion might be arrived at, but no such facts are proven or even alleged.

The case of the Atlantic Dredging Company, 53 Ct. Cl. 490, and 253 U. S. 1, is not similar to this case. The facts in the two cases are entirely different.

For the reasons above stated the petition of the plaintiff must be dismissed. It is so ordered.

Graham, Judge, Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 38] VI. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Nineteenth day of March, A. D., 1923, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed: And it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One Hundred and Forty-seven dollars and seventy-six cents ($147.76), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. PROCEEDINGS AFTER THE ENTRY OF JUDGMENT

On May 28, 1923, by leave of court, the plaintiff filed a motion for a new trial. On June 4, 1923, the court filed an order overruling said motion.

[fol. 39] VIII. PLAINTIFF'S APPLICATION FOR AND ORDER ALLOWING APPEAL—Filed Aug. 14 and 17, 1923

Now comes the plaintiff by its Attorney and moves the Court to grant it an appeal to the United States Supreme Court from its Judgment dismissing the petition herein rendered by this Honorable Court on the 19th day of March, 1923, and from the order of this Court of June 4th, 1923 overruling plaintiff's motion to amend the findings of fact and for a new trial for errors of law.

Respectfully, Horace S. Whitman, Attorney for Plaintiff.

[File endorsement omitted.]

Ordered: That the above appeal be allowed as prayed for.

Geo. E. Downey, Judge U. S. Court of Claims.

[File endorsement omitted.]

[fol. 40] COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the Court by Hay, J.; of the Judgment of the court; of the application of plaintiff for an appeal to the Supreme Court of the United States and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eleventh day of September, A. D., 1923.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 29,870. Court of Claims. Term No. 560. Sanford & Brooks Company, appellant, vs. The United States. Filed September 20th, 1923. File No. 29,870.

FILED
JAN 9 1925

NO. 175. OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

SANFORD AND BROOKS COMPANY

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

HORACE S. WHITMAN,
Attorney for Appellant.

WILLIAM L. MARBURY,
CHARLES CLAGETT,
Of Counsel

Motion to Remand

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IN THE

Supreme Court of the United States

SANFORD AND BROOKS COMPANY

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO REMAND TO THE COURT OF CLAIMS FOR FURTHER FINDINGS OF FACT.

The appellants, Sanford & Brooks Company, by its attorneys, respectfully represents to this Honorable Court:—

1. That this cause arises out of dredging operations, which, according to the original intention of the parties, would have been executed under a contract between the appellant company and the United States, for the dredging of a specified channel or waterway connecting the Little Annemessex River with Pocomoke Sound, in the vicinity of Crisfield, Maryland, at a stated price per cubic yard of the material dredged. Due to an error by the Government inspector, the work was instituted along the wrong lines from the very start and the appellant proceeded, dredging a channel along the wrong location, for a period of more than a month before the error was discovered by either party. Upon discovery of the error,

the contractor notified the inspector, who took it up with the proper officials, and it was decided that the contractor should continue dredging outside of the contract limits for a considerable distance. This the contractor did, the material thus dredged being more difficult than that contemplated by the contract. During the progress of the work the contractor claimed recovery for the work so done outside the contract limits on a *quantum meruit* basis, and the Government admitted its liability upon this basis; however, no final arrangement was ever come to and the contractor has been paid only the contract price for the work done, which is not reasonably adequate compensation. This cause is the further prosecution of that claim.

2. We place in parallel columns the relevant findings requested on the trial and on the motion for a new trial, and the findings as made by the Court. (Portions of the findings irrelevant to the question raised by the appeal are omitted; points in the requested findings on which the Court made no finding whatsoever are placed in italics. The evidence supporting the findings requested by the appellant will be found in the motion for a new trial attached hereto as Exhibit "B" and in the exhibits therein.):

FINDINGS OF THE COURT.	FINDINGS REQUESTED ON THE TRIAL.	FINDINGS REQUESTED ON THE MOTION FOR A NEW TRIAL.
III. The plaintiff began work on November 16, 1914, at the place and upon the lines designed by an inspector of the Government. On December 18, 1914, it was ascertained that the	V. * * * The contractor began work on the 16th day of November, 1914, at the place upon the lines designated and laid down by the contracting	III. The plaintiff began work on November 16th, 1914, at the place and upon the lines designated by an inspector of

dredging being done was not within the area indicated upon the contract drawings. This was called to the attention of the contracting officer who decided that an error had been made in the location of the work, and he directed that the work proceed along the wrong location until it reached a point which coincided with the location as laid down in the contract and thence upon the proper location. The amount of material dredged outside of the contract limits was 28,098 cubic yards. The plaintiff continued the work outside of the contract limits without protest in writing, nor did it make a claim for extra work in accordance with the provisions of the contract, and accepted the contract price for the material dredged outside of the contract limits. The material dredged outside of the contract limits consisted of mud, sand, hard sand and clay. The plaintiff completed the contract on December 12, 1916, and was paid in full the contract price for the number of cubic yards dredged (Rec., p. 21).

V. * * * as the work progressed, both inside and outside the contract limits, the material to be dredged was found to consist of mud, sand, hard sand and hard clay with some stumps interspersed (Rec., p. 22).

officer through his agents. * * *

About the 18th day of December, 1914, after the contractor had been at work for over a month along the lines designated it was noticed that the excavation being conducted was not within the area indicated upon the contract drawings. This was called to the attention of the contracting officer, who decided that an error in the location of the work had been made by *the Government agent, but that it was impracticable to abandon the work in the location in which the contractor had been working, and to relocate the channel in accordance with the contract. Over the protest of the contractor* the engineer directed that work proceed along the range upon which the work was being done, although outside of the lines of the contract. (See Exhibit "A," Paragraph V.)

VI.

The contractor proceeded with the excavation as directed by the engineer outside of the contract lines until about the 15th day of May, 1915. The distance that the contractor dredged outside of the contract lines was about 1,750 feet.

Throughout the location of the channel as originally planned for this area, the material was of a character near to that indicated in the specification, i. e., mud and sand. The error in location of the channel threw the excavation the defendant *as the lines shown in the contract drawing.* On December 18, 1914, it was *first* ascertained that the dredging being done, *due to erroneous location by the defendant,* was not within the area indicated on the contract drawing. *The plaintiff and the defendant had no knowledge until December* 18, 1914, *that the work had not been located in accordance with the contract drawing.* Upon this being called to the attention of the contracting officer, he decided that the error had been made in the location of the work and he directed that the work proceed along the lines improperly laid down until it reached the 6 ft. contour in the channel which was the northernmost end of the channel to be dredged. *The material the plaintiff dredged outside of the contract lines was harder and more difficult to dredge than the material in the contract lines.* Plaintiff dredged 28,098 cu. yds. outside of the contract limits *at a total cost of* $25,429.92, *including* 15 *per cent. for overhead and profit and for the same received from the United States* $2,972.74 *at the contract rate of* $.07 9/10 *per cu. yard. When it was discovered that the work being done was outside of the contract lines, the plaintiff was directed by the defendant to continue the work outside of the contract lines, because it would have been more expensive for the de-*

*into a much deeper cut and into dense hard clay. * * **

During the time occupied in the work outside and inside the contract limits the plaintiff demanded payment for the work outside the contract limits upon a fair basis, that is, upon quantum meruit. This claim was urged and December 18, 1915, *was finally passed upon by E. H. Crowder, Judge Advocate General of the United States Army, who found as follows:*

(Here followed a part of the opinion of the Judge Advocate General, to be found in the Report of the War Department attached as an exhibit to the motion for a new trial which is Exhibit "B" attached hereto.) (See Exhibit "A." Paragraph VI.)

VII.

Plaintiff has, however, not been paid for the work outside of the contract anything but the contract price per cubic yard of material excavated, *that is* 7.9 *cents per cubic yard.*

The contractor was engaged in work outside of the contract one hundred and fifty-three (153) *days. During that time, he made the following expenditures for the work on the channel, which expenditures were reasonable in consideration of the character of the materials found and plant employed.*

(a) *Towing, fresh water, coal, payroll, operating expenses and supervision,* $15,182.97.

The plaintiff employed upon the work outside defendant to have returned to the proper lines. The plaintiff completed the northern end of the channel as directed, but did not protest in writing against doing so, nor did it file a claim for extra work under Article 7 of the contract. *It did, however, protest both orally and in writing against the payment for the work outside of the contract limits at the contract price of* $.07 9/10 *a cu. yd. It did make a claim for the work done outside of the contract lines and refused to accept the final payment therefor at the contract rates.* The material dredged outside of the contract limits consisted of mud, sand, hard sand and clay and all interspersed with logs and stumps. The plaintiff completed the contract on December 12, 1916, and was paid the full contract price for the number of cubic yards dredged.

The plaintiff presented its claim to the defendant for work done outside of the contract limits and the defendant held that this work was not covered by the contract and admitted its liability for payment therefor upon a quantum meruit and the defendant's officers were directed by the Secretary of War to agree with the plaintiff as to a proper amount to be paid for the work done outside of the contract lines. This the plaintiff and defendant were never able to agree upon, although the plaintiff was tendered

the contract limits the following equipment, and the fair rental value thereof for the time employed is as shown below:

(b) 12-*inch hydraulic dredge*, 153 *days* $4,590.00

Clamshell dredge and two scows, 78 *days*. 2,340.00

Total $6,930.00

(c) *Overhead and profit on* (a) *and* (b) *at* 15 *per cent*. $3,316.95

Total $25,429.92

Less amount received from U. S. 2,972.74

Balance due and unpaid . . . $22,502.18

(See Exhibit "A," Paragraph VII.)

$1,382.45 *in settlement of this claim.*

(See Exhibit "B," Paragraph III, pp. 6-7. 9. For evidence in support of this finding see Exhibit "B," pp. 7-8 and Report of War Department attached thereto as an exhibit.)

The Court made no findings on the following material points:

1. That the plaintiff protested to the contracting officer against proceeding on the wrong location.

2. That the plaintiff was directed by the contracting officer to continue outside the contract lines because it would have been impracticable and more expensive to the Government to return to the contract lines.

3. That the plaintiff protested orally to the contracting officer against payment for the work done outside the contract limits at the contract price.

4. That during the progress of the work the plaintiff presented its claim to the contracting officer for the work done, and that this claim was entertained by that officer.

5. That the Judge Advocate General held that the plaintiff was entitled to recover on a *quantum meruit*, and that the Secretary of War directed the contracting officer to come to a settlement on this basis.

6. The reasonable cost to the plaintiff of the work done outside of the contract line, and that this was never paid to the plaintiff.

On the following points the Court while finding inferentially in accordance with the plaintiff's claim did not make a clear finding:

1. That the work was begun on the wrong location through the error of the Government's agent.

2. That until more than one month after the work had begun neither the defendant nor the plaintiff knew of the error.

All of the above findings of fact asked for by appellant are material and necessary for a proper determination of this case and covered by evidence in the record below.

Wherefore, the appellant moves this Court to remand the cause to the Court of Claims and to direct the lower Court to find:

1. Whether or not the plaintiff made oral protest to the proper official against proceeding on the wrong location.

2. Whether or not the contracting officer directed that the work proceed outside the contract lines and for what reason.

3. Whether or not the plaintiff protested orally to the contracting officer against payment for the work done outside the contract lines at the contract price.

4. Whether or not the plaintiff during the progress of the work presented its claim to the contracting officer for work done outside of the contract limits, and whether or not this claim was entertained.

5. Whether or not this claim was referred to the Judge Advocate General and the Secretary of War and what action they took thereon.

6. What is the reasonable cost to the plaintiff of the work done outside the contract lines and whether or not the plaintiff has been reasonably compensated.

7. Whether the work was done on the wrong location through the error of the Government's contracting officer through his agents.

8. Whether until more than one month after the work had begun neither the defendant nor the plaintiff knew of the erroneous location.

HORACE S. WHITMAN,
Attorney for Appellant.

WILLIAM L. MARBURY,
CHARLES CLAGETT,
Of Counsel.

BRIEF ON THE FOREGOING MOTION.

A motion of this character is a proper motion. *United States v. Adams*, 9 Wallace, 661; *United States v. Archer*, 241 U. S., 119; *Fidelity and Deposit Company v. United States*, 256 U. S., 296.

The facts upon which this motion are based are sufficiently set forth in the motion itself. It is the contention of the appellant that the failure of the Court to make the findings emphasized in its motion to remand has made it impossible for the Court to come to a proper decision in this case. Stated at its briefest, the appellant insists that there was in the record ample evidence, in many instances undisputed, to show that the provisions of the contract involved in this case did not apply to the situation out of which its claim arose. That accordingly the appellant was entitled to a reasonable compensation for work so done, to wit, $25,492.92; due to the increased difficulty of the work, the contract price, $2,972.74, was in no sense such a compensation as he was entitled to. (See brief on merits accompanying this motion.)

Two expressions of the Court in finding III require explanation. The Court says that the plaintiff

> "accepts the contract price for the material dredged outside the contract limits."

Again it is said

> "the plaintiff was paid in full the contract price for the number of cubic yards dredged."

This might be taken to mean that the plaintiff accepted the contract price in full payment without protest. Such a holding would be entirely arbitrary, there being no evidence to that effect. That such is not the meaning of the Court is shown by the following extract from the opinion accompanying the findings:

> "it (the plaintiff) ignored the provisions of the contract, and continued to perform what it alleged to be extra work and to accept without written protest the contract price therefor."
> (See Record, p. 23.)

Accordingly, we must read the finding thus: "the plaintiff accepted without *written* protest the contract price, etc." Again, the plaintiff "was paid the full contract price for the number of cubic yards dredged."

If to the findings of the Court so construed be added the findings requested by the plaintiff and supported by the evidence, we have the following narrative:

> "The plaintiff began work on November 16th, 1914, at the place and upon the lines indicated by an inspector of the Government *as the lines shown in the contract drawing.* On December 18, 1914, it was *first* ascertained that the dredging being done was not within the area indicated upon the contract drawing, *due to erroneous location by the Government's Inspector. The plaintiff and defendant had no knowledge until December 18, 1914, that the work had not been located in accordance with the contract drawing.* This was called to the attention of the contracting officer, who decided that an error had been made *by the Government's inspector* in the location of the work, *but that it was impracticable to abandon the work in the location in which the contractor had been working and to re-locate the channel in accordance with the contract, especially be-*

cause it would have been more expensive to do so. Over the protest of the contractor the contracting officer directed that the work proceed along the wrong location until it reached a point which coincided with the location as laid down in the contract, and thence upon the proper location. The plaintiff continued the work outside of the contract limits without protest in writing, nor did it make a claim for extra work in accordance with the provisions of the contract, *but it did protest orally to the contracting officer against such proceedings and protested to the same officer orally against the payment of the work done outside of the limits at the contract price.* It accepted the contract price for the material dredged outside the contract limits, *but not as final payment therefor. During the progress of the work the plaintiff presented its claim to the contracting officer for the work done outside the contract limits and demanded payment upon quantum meruit. This claim was referred to E. H. Crowder, Judge Advocate General, who held that the work was not covered by the Contract and admitted the Government's liability for payment therefor upon a quantum meruit. The defendant's officers were directed by the Secretary of War to agree with the plaintiff as to a proper amount to be paid for the work done outside of the contract line. This the plaintiff and the defendant were never able to agree upon, although the plaintiff was tendered $1,382.45 in settlement of this claim.* The plaintiff continued the work outside of the contract limits *until about the 15th day of May, 1915. The distance that the contractor dredged outside of the contract limits was about 1,750 feet.* The amount of materials dredged outside of the contract limits was 28,098 cubic yards *at a total cost of $25,429.92, including 15 per cent. for overhead and profit, which expenditures were reasonable in consideration of the character of the materials found and plant employed.* The material dredged outside of the contract limits consisted of mud, sand, hard sand and hard clay, with some stumps interspersed. The plaintiff completed the contract on December 12, 1916, and was paid the full contract price, namely,

$2,972.74, for the number of cubic yards dredged. *It received no other compensation.*

In the facts as so stated there are no contradictions of any findings made by the Court of Claims. There are simply findings placed in italics on additional matters joined with the findings of the Court of Claims to tell the whole story.

We respectfully submit that until the additional findings requested have been made a proper judgment cannot be rendered in this case.

Respectfully submitted,

HORACE S. WHITMAN,
Attorney for Appellant.

WILLIAM L. MARBURY,
CHARLES CLAGETT,
Of Counsel.

District of Columbia, ss:

Horace S. Whitman being duly sworn deposes and says that he is one of the attorneys for the appellant in the above entitled cause No. —— of the October Term, 1924; that he is familiar with the record thereof in the Court of Claims and in this Court; that he helped to prepare and has read the foregoing motion; that he believes the facts therein set forth to be true; that in his opinion the facts set forth in the findings of the Court of Claims are insufficient for this Court to pass upon the claim in dispute; that the findings of fact are insufficient in not including therein:

1. Whether or not the plaintiff made oral protest to the proper official against proceeding on the wrong location.

2. Whether or not the contracting officer directed that the work proceed outside the contract lines and for what reason.

3. Whether or not the plaintiff protested orally to the contracting officer against payment for the work done outside the contract lines at the contract price.

4. Whether or not the plaintiff during the progress of the work presented its claim to the contracting officer for work done outside of the contract limits, and whether or not this claim was entertained.

5. Whether or not this claim was referred to the Judge Advocate General and the Secretary of War and what action they took thereon.

6. What is the reasonable cost to the plaintiff of the work done outside the contract lines and whether or not the plaintiff has been reasonably compensated.

and in not including clear findings on these two points:

7. Whether the work was done on the wrong location through the error of the Government's contracting officer through his agents.

8. Whether until more than one month after the work had begun neither the defendant nor the plaintiff knew of the erroneous location.

That without such findings this Court cannot properly pass upon the issue submitted to it.

HORACE S. WHITMAN.

Subscribed and sworn to before me this 10th day of January 1925.

F. A. Cutting
Notary Public.

EXHIBIT "A."

IN THE COURT OF CLAIMS.

No. 95-A.

SANFORD & BROOKS CO.

vs.

THE UNITED STATES.

PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND BRIEF.

The claimant considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the Court to find the same as follows:

I.

The plaintiff, the Sanford & Brooks Co., is a corporation organized and existing under the laws of the State of Maryland.

II.

On July 9, 1914, the defendant advertised for bids and issued specifications for dredging in Broad Creek, Maryland, stating that bids would be received at the United States Engineer Office at Baltmore, Md., until 2.30 P. M., July 24, 1914. The plantiff applied to the said office for information, was furnished with a copy of the specifica-

tions and drawings and told that the line of the proposed work was indicated upon the site of the work by stakes. (Dorsey, p. 35, q. 19; Exhibit A, p. 11, etc.; Dorsey, p. 34, qq. 2 to 6.)

III.

The plaintiff's engineer went upon the site of the work, but was unable to locate the lines thereof, because the stakes that had once marked the lines thereof had in most instances been lost or destroyed. A superficial examination was made, but nothing definite could be determined as to the character of the material, as the proposed channel itself could not be located. (Dorsey, p. 34, qq. 2-10; p. 47, qq. 180-200; p. 49, qq. 222-223; p. 61, q. 387.)

IV.

Relying upon the statements in the specifications as to what was believed to be the character of the materials to be excavated, the plaintiff bid upon the work, was awarded the work and entered into a formal contract for the execution thereof dated the 31st day of July, 1914, which is attached hereto marked Exhibit A, together with the specifications and drawings by reference made a part of the contract, marked respectively Exhibit B and Exhibit C. (Dorsey, pp. 34-35, qq. 11-19; Exhibit A, p. 11, etc.; Exhibit B, p. 25, etc.; Hart, p. 72, qq. 6-8; p. 75, q. 33.)

V.

The contractor placed a plant at the site of the work which was adequate and proper for the completion of the

work in such material as was indicated in the specifications within the area specified and within the time limit. The plant had been submitted to the defendant and approved by the defendant before being placed upon the work. (Dorsey, pp. 35-36, qq. 22-25; p. 43, q. 128; p. 44, qq. 150-151.)

The contractor began work on the 16th day of November, 1914, at the place and upon the lines designated and laid down by the contracting officer through his agents. (Dorsey, p. 36, qq. 26-37.)

The contractor proceeded with the work as laid out, but found that the material to be dredged was not mud and sand, but a dense clay that was much more difficult to excavate by hydraulic appliances such as the contractor had upon the work and which were adequate and proper for the excavation of mud and sand. (Dorsey, pp. 36-38, qq. 37-66.) About the 18th day of December, 1914, after the contractor had been at work for over a month along the lines designated it was noticed that the excavation being conducted was not within the area indicated upon the contract drawings. This was called to the attention of the contracting officer, who decided that an error in the location of the work had been made by the government agent, but that it was impracticable to abandon the work in the location in which the contractor had been working, and to relocate the channel in accordance with the contract. Over the protest of the contractor the engineer directed that work proceed along the range upon which the work was being done, although outside of the lines of the contract. (Dorsey, p. 48, q.

201; pp. 70-71, qq. 401-414; Doyle, pp. 95-98, qq. 120-129; Report of War Dept.)

VI.

The contractor proceeded with the excavation as directed by the engineer outside of the contract lines until about the 15th day of May, 1915. The distance that the contractor dredged outside of the contract lines was about 1750 feet. (Dorsey, p. 43, q. 129.)

Throughout the location of the channel as originally planned for this area, the material was of a character near to that indicated in the specification, i. e., mud and sand. The error in location of the channel threw the excavation into a much deeper cut and into dense hard clay. (Dorsey, p. 37, qq. 46-51; Report of War Dept., p. —.)

Upon the completion of the work outside of the contract, the contractor was granted an extension of time for the completion of the whole contract of fifty-eight days, because of the added difficulty in excavating the material upon the erroneous location. (Report of War Dept.)

During the time occupied in the work outside and inside the contract limits the plaintiff demanded payment for the work outside the contract limits upon a fair basis, that is, upon *quantum meruit*. This claim was urged and December 18, 1915, was finally passed upon by E. H. Crowder, Judge Advocate General of the United States Army, who found as follows:

"I do not think that this change can be considered as a minor change, which the engineer officer is authorized to make under the terms of the contract, and therefore am of opinion that this work must be regarded as not covered by the contract, and that, therefore, the contractor is entitled to a *quantum meruit* compensation for the same. In determining this compensation the sole question is as to the value of the work, in view of the time consumed therein as affected by the material encountered. In making this determination it is not proper to consider that the effect of the change was to release the contractor from the work on the line A-B, which he might have been required to perform, although more difficult than represented in the specifications. This being extra work and not covered by the contract, the sole questions to be determined is that of a fair compensation for its performance. If this view be approved, I think the papers should be returned with a view to an agreement with the contractor as to a fair compensation for the dredging of the channel X-B." (Report of War Dept., Doyle, p. 98.)

VII.

Plaintiff has, however, not been paid for the work outside of the contract anything but the contract price per cubic yard of material excavated, that is 7.9 cents per cubic yard.

The contractor was engaged in work outside of the contract limits one hundred and fifty-three (153) days. During that time, he made the following expenditures for the work or the channel, which expenditures were reasonable in consideration of the character of the materials found and plant employed.

(a) Towing and fresh water	$ 2,555.30
Coal	2,364.93
Payroll	3,638.57
Operating expenses	5,358.43
Supervision	1,265.74
	$15,182.97

The plaintiff employed upon the work outside the contract limits the following equipment, and the fair rental value thereof for the time employed is as shown below:

(b) 12-inch hydraulic dredge "Deposit" centrifugal type with cutter attachment. 17 pontoons. 1,500 ft. spiral riveted asphalt pipe, 153 days at $30 per day	$ 4,590.00
Clamshell dredge "Dixon" and two scows, 78 days at $30 per day	2,340.00
Total	$ 6,930.00
(c) Overhead and profit on (a) and (b) at 15 per cent	$3,316.95
Total for work including profit (a), (b) and (c)	25,429.92
Less amount received from U. S. for work outside contract limits	2,972.74
Balance due and unpaid	$22,502.18

(Dorsey, pp. 38-43, qq. 68-138, pp. 60-61, qq. 381-386, p. 99, qq. 1-3; Plaintiff's Exhibit No. 2, p. 62; Allison, p. 68-70; Hart, p. 72-74, qq. 9-25, p. 75, q. 36; Plaintiff's Ex. No. 4, p. 76; Daily, pp. 77-78; Coblentz, pp. 79-81.)

VIII.

The statement in the specifications that "the material to be removed is believed to be mud and sand" was not

true. In fact, that at the time of making said statement and representation the defendant and its agents had no information regarding the character of the material to be removed sufficient to form the basis of any such belief and therefore knew that such statement was a mere guess as to the character of the material. If any examination of the materials to be removed had been made by the defendant, such as would be sufficient to enable them to form any belief as to the character of the material to be removed, the fact must inevitably have been disclosed that the material to be removed was not mud and sand but material, far more difficult and expensive to dredge than mud and sand. (Dorsey, pp. 61-62, qq. 389-400; Brownell, pp. 63-67; Doyle, p. —, qq. 113-118.)

IX.

The plaintiff began work within the contract lines on the 17th day of May, and completed the work on the 18th day of May, 1915. (Dorsey, p. 43, qq. 129-131.) The material encountered throughout in the prosecution of the work within the contract line was only in a small degree mud and sand as stated to be the belief of the defendant in the specifications, but was mostly dense clay, interspersed with stumps. (Dorsey, p. 43, qq. 131-132.) The contractor placed a hydraulic dredge equipped with a cutter upon the work. This dredge was a usual and proper dredge for work in mud and sand, and of adequate capacity for the completion of the excavation required in mud and sand within the contract period.

The dredge furnished for the work was not of a character to be employed economically in the kind of the material found. The contractor was compelled to furnish other and different equipment due to the character of the material at great expense to itself. (Dorsey, p. 43, qq. 133-138; p. 53, qq. 272-286; p. 61, qq. 387-388.)

It was much more difficult and expensive to excavate the materials found than it would have been to excavate the materials described in the specifications. (Dorsey, p. 44, q. 151.)

X

The reasonable cost of the work done by the contractor is shown as follows:

(a) Towing and fresh water	$ 6,194.70
Coal	5,733.17
Pay roll	8,820.27
General operating expenses, requires to plant, supplies, insurance, etc.	12,990.12
Supervision	3,934.26
	$37,673.02

The plaintiff employed upon the work within the contract limits the following equipment, and the fair rental value thereof for the time employed is as shown below:

(b) 12-inch hydraulic dredge "Deposit" centrifugal type with cutter attachment.	
17 pontoons.	
1,500 ft. spiral riveted asphalt pipe, 447 days at $30 per day	$13,410.00
Clamshell dredge "Dixon" and scows, 113 days at $30 per day	3,390.00

(c) Overhead and profit on (a) and (b) at 15 per cent	8,170.95
Total for work, including profit on (a), (b), and (c)	62,645.97
Less amount received from United States for work	15,517.99
	$47,127.98

Plaintiff's Ex. No. 3, p. 62; Dorsey, pp. 40-43, qq. 96-128, Ibid., pp. 43-44, qq. 138-148; Ibid., p. 45, qq. 154-155; Ibid., pp. 59-61, qq. 383-386; Allison, pp. 68-70; Hart, pp. 72-76, qq. 9-40; Daily, pp. 77-79; Coblentz, pp. 79-81; Dorsey, p. 99, qq. 1-3.)

Statement of the Facts.

The improvement of Broad Creek, Md., had been under contemplation for many years. It was back in July, 1891, that the first survey of the project was made. E. H.Brownell, now a Commander in the Civil Engineer Corps of the United States Navy, was at that time the young engineer in the employ of the War Department, and he was sent upon the work to make an investigation as to the location of the channel and the quantity of materials that would be required to be removed. He was in charge of the survey party and made a survey in the year 1891 and made his report to the proper officers, and the notes of the survey were platted upon a map which is filed in this case and marked plaintiff's Exhibit No. 1. Brownell's survey party made a survey and determined the elevation of the surface of the earth beneath the water. He made no attempt to determine the character of the materials that lay beneath the surface of the bottom of the Creek. All that he did was to sound for the

elevation with either a rod or a lead line and he recorded the character of the bottom as he found it. In tidewater areas the character of the surface below the water is no indication of the materials that lie beneath it that would have to be removed in such an operation as contemplated.

The survey and notes made by Brownell was the only information that the Government had as to the character of the materials. When the specifications for the work were issued in 1914, it was stated therein that the "material to be removed is believed to be mud and sand, but bidders are expected to examine the work and decide for themselves as to its character and make their bids accordingly, as the United States does not guarantee the accuracy of this description." The plaintiff company's agent went to the office from which the specifications were issued, was given a copy of the specifications and he was told that the canal or channel was staked upon the ground and that he would have no difficulty in locating it, in order to make his investigations.

Dorsey, the plaintiff's agent, went down there, but did not find the channel staked as he had been told. He, of course, had not taken any survey instruments with him and the question of the location of the channel was purely guess work with him. He did find many stakes, especially throughout the then existing channel or out through the low land. He attempted to investigate the character of the soil removed and found that in a few places where he sounded that the material was not soft mud and sand but concluded that he was off the line of the channel, as in other instances he did find soft mud and sand. As he

was not able to make a proper investigation and, assuming that there was some basis for the foundation of the Government's statement of its belief that the material to be removed was mud and sand, the plaintiff company made its bid to remove the material at and for the sum specified in the contract. In making its bid, plaintiff company submitted with its bid an itemized statement of the character of the plant to be employed upon the work, which plant consisted of a 20-inch suction dredge. The suction dredge was suitable for operation in mud and sand and was a proper plant for the removal of the material specified. This plant was approved by the Government indicating again to the plaintiff that the Government's knowledge as to the character of the material indicated that it was soft mud and sand. It later developed that the draught of the 20-inch suction dredge was too deep for the use in the waters of Broad Creek and a 12-inch suction dredge with a less draught was substituted with the approval of the defendant's officers. dredge substituted, however, was of the same character as the dredge orginarily proposed to be used and suitable for operation in the same kind of material.

When the plaintiff's men went to work they were directed by the inspector in charge of the work where to commence and the lines of the work were laid out for them by the inspector. The plaintiff proceeded to work along the lines as directed, but at once discovered that the material to be removed was not mud and sand, but a very hard and dense clay interspersed with many stumps. The dredge that he had placed upon the work was not at

all suitable for removal of the character of the material actually found. The plaintiff also discovered that the material in which he was working was heavier and necessitated a deeper cut along the lines laid down than it would have been had the location of the work been made a little further to the south. He appealed to the engineer in charge and asked that the location be removed to a line where the character of the material was more nearly in conformity with that described in the specifications, but was told to proceed with the work along the lines laid down.

After he had been at work more than a month, it became apparent to the contractor that he was not working along the lines of the channel as laid down on the plat which accompanied the contract and specifications, and he so reported to the Government engineer in charge of the work. Investigation was immediately ordered and as a result of this investigation it was discovered that the work practically from its inception had been done outside of the lines prescribed by the contract and that the location of the work outside of the lines of the contract had thrown the work into a deeper cut and had caused the contractor to remove a much larger amount of the heavy dense clay. The engineer in charge of the work then directed the contractor to proceed along the lines upon which he was working, although outside of the lines of the contract. The contractor proceeded as directed along the lines outside of the contract and carried that end of the work to a conclusion entirely outside of the contract lines.

During the progress of the work, it became apparent that the suction dredge was not fitted for the removal of the character of the material actually found and the contractor in order to get the work done at all within a reasonable period was compelled to put upon the work additional equipment consisting of a clam shell dredge. The clam shell dredge would dig the material and place it in a scow in a more or less broken up state, saturated with water and the suction dredge would then operate by taking the material from the scow and pumping it through the pipe to the place where it was directed to be deposited. Had not this dredge been employed, the contractor would have been required to keep his plant and forces there for a much longer period.

The defendant paid the contractor only the contract price per cubic yard for the removal of the material although the contractor demanded payment upon a *quantum meruit*. The matter of payment to the contractor upon this basis waa considered and finally referred to the Judge Advocate General of the Army and he decided that payment should be made to the contractor upon that basis. Negotiations were had between the contractor and the engineer in charge of the work to arrive at a settlement, but were never able to agree upon an amount that was in any way satisfactory to both parties. The contractor expended upon the work outside of the contract lines $15,182.97 and a fair rental for the plant which he employed upon the work was $6,930, a fair amount of overhead and profit on the work would be 15% or $3,316.95, making a total for the work outside of the lines

of the contract of $25,429.92. The contractor was paid only $2,972.74 for work done outside of the contract lines. He is, therefore, entitled to recover $22,502.18 upon a *quantum meruit* for work done outside of the contract lines.

Work Inside the Contract Lines.

Upon the completion of the work outside of the contract lines, the contractor's attention was then directed to another section of the work which lay within the contract lines. The work there was in material of practically the identical character of that found outside of the contract lines that he had previously done. There was only a small amount of the material soft mud and sand. Most of it was the dense clay and other materials that were not suitable to be removed by the suction dredge. The dredge was operated, together with the clam shell dredge, in this clay material and the work finally completed at a great loss to the contractor. The contractor's plant that he had upon the work was such that had the material been soft mud and sand he would have been able to have completed the work within the time specified at a profit. The contractor actually expended on the work within the contract lines $37,675.02. The conservative rental value of the plant used on the work inside the contract lines was $16,800, making a total for the amounts expended and used of plant $54,473.02. Fifteen per cent for overhead and profits on both amount to $8,120.95, making a total for the work inside the contract lines of $62,643.97. He was paid for this work $15,517.99. The difference between the total for the work including overhead and profit and the amount received is $47,125.98.

Brief.

The issues in this case are two:

1st. Whether or not the defendant is liable upon a *quantum meruit* for work directed to be done outside of the contract lines.

2nd. Whether or not the defendant is liable to pay the contractor for the value of his services or upon a *quantum meruit* where the contractor makes his bid for work relying upon the statement as to the belief of the defendant as to the character of the materials to be excavated when the materials actually excavated turn out to be different from those stated in the specifications and much more costly and difficult to remove.

Work Outside of the Lines.

It is the undisputed evidence in this case that the contractor was directed to work outside of the lines prescribed by the contract that the work outside of the lines of the contract was more difficult than the work would have been had the work been performed along the lines originally shown in the contract drawing. The contractor protested against such work immediately, both before and after he found out that the work was outside the contract lines. It is well settled that where a contractor is directed to do work outside of the contract that he is entitled to pay upon a *quantum meruit*.

E. L. P. and J. A. Smith, 54 Ct. Cl. 119, and the Snare & Triest Company, 55 Ct. Cl. 386. Merril Ruckgaber Co., 49 Ct. Cl., at page 566.

We respectfully submit that we are, under the cases cited, entitled to recover the actual cost of the work done plus a reasonable rental value of the plant employed, plus a reasonable amount for overhead and profit. The contractor's figures in this case are conservative and by the witnesses produced show that he was asking a very moderate rental for his plant. In fact, the Government's price on a similar plant during the same time was higher than the contractor is here asking for his. This item should be allowed in full.

Work Within the Contract Lines.

Our right of recovery in this case is based upon the decisions of this Court and the Supreme Court in the case of the Atlantic Dredging Company, 53 Ct. Cl. 490, and 253 U. S. 1. In that case the specifications were almost identical with the specifications herein. The Atlantic Dredging Company specifications provided:

> "QUALITY OR CHARACTER OF MATERIAL. The material to be removed is believed to be mainly mud or mud with an admixture of fine sand * * * bidders are expected to examine the work, however, and decide for themselves as to its character, and to make their bids accordingly, as the United States does not guarantee the accuracy of the description."

The facts of that case as developed disclosed that the Government did not actually believe that the material to be removed was "mainly mud or mud with an admixture of fine sand." The fact was that the Government knew that other material was in the location. The Court below and the Court above both held that the statement as to the belief of the material was a warranty and they held

that the contractor was entitled to recover upon the theory that there was a breach of warranty.

See also U. S. v. Spearin, 248 U. S. 132.

The Court held in the Atlantic Dredging Company case, *supra*, as follows:

> "There is a further assertion of belief through its 'contracting officer' by the approval of the company's plant. As we have seen, the Government's case of its interests extended to the inspection of the instrumentalities of the contractor and required the character and capacity of the plant which was to be used to be submitted for inspection and approval. In fulfillment of the requirements the company submitted its plant. It was only efficient for dredging materials of the character mentioned in the specifications and described on the map, and it was so approved. The significance of the submission and approval are manifest. The character and capacity of the plant conveyed to the officer the fact that the company was accepting as true the representation of the specifications and the map of the materials to be dredged; and reciprocally the approval of the plant by the officer was an assurance to the company of the truth of the representation and a justification of reliance upon it.
>
> The case is, therefore, within the ruling of United States vs. Spearin, 428 U. S. 132-136, where it is stated that the direction to the contractors to visit the site and inform themselves of the actual conditions of the proposed undertakings will not relieve from defects in the plans and specifications, citing Christie vs. U. S., 237 U. S. 234; Hollerbach vs. U. S., 233 U. S. 165; and U. S. vs. W. N. & C. Stage Co., 199 U. S. 414. It is held in these cases 'that the contractor should be relieved, if he was misled by erroneous statements in the specifications.' The present case is certainly within the principle expressed. In the cited cases there was no qualification of the

> requirement; in this case it was accompanied by the expression of belief, and conduct, which was, in effect, a repetition and confirmation of the belief and gave assurance that it had a reliable foundation. The company was, therefore, justified in acting upon it."

The language above quoted applies to the facts in this case. The contractor was not able to make an adequate investigation of the character of the material to be removed and the best evidence that he relied upon the statement of the belief of the Government as to the character of material to be removed is the price that he bid for the work and the character of the plant that he proposed to use. That he could not make a proper investigation of the material along the lines of the contract because the lines of the contract were not marked as represented to him, is that the Government engineers when they put him to work put him to work outside of the lines of the contract. The defendants stated in the specifications that they believed the material to be mud and there was a warranty on the part of the Government that they believed the material to be mud and sand and the contractor was justified in acting upon that statement of belief upon the theory that it had a reliable foundation.

Atlantic Dredging Company case, *supra*.

"Belief" is defined in Funk & Wagnall's Dictionary as true in testimony or authority; to be convinced as the result of study or reasoning.

In Edgington vs. Fitzmaurice, Law Rep. 29, Chancery Division, 459, in the course of the opinion the Court stated:

> "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact."

In Giddens vs. Mirk, 4 Ga. 364, at 369, the Court said:

> "When used in reference to an existing fact, and not as relating to a matter of belief in religion, morals or science, 'belief' is the condition of the mind founded on evidence that a fact exists, an act is done, or that a statement is true; and when one says he believes that a fact exists, or that an act was done by another, he must be understood to assert that there was present in his mind sufficient to convince him that the fact in reality existed."

"Belief" is not synonymous with "imagine," "presume" or "suspect."

Giddens vs. Mirk, *supra;* Hammock vs. certain lottery tickets, 5 Cush. (Mass.), 369-373.

"Belief" implies the actual conclusion drawn from information.

Humphreys vs. McCall, 9 Cal. 59, 62, 70.

"Belief" is that conviction which follows from the consideration of facts or evidence.

Schloss-Sheffield Steel Co. vs. O'Neal, 169 Ala. 83.

The record in this case discloses the fact that the Government had no sufficient data upon which to base the belief as to the character of the material to be removed.

Brownell, who made the survey, testified that the survey which was the only information that the Government had as to the character of the material to be removed testified that all he did was to determine the character of the bottom as found and that the character of the bottom in tidewater is no indication of the character of the material that lies beneath the bottom. This is, of course, uncontradicted, as it is elemental. Doyle, the Government's engineer, testified that they had no other information than the notes of the Brownell survey. The plaintiff's testimony is that he relied upon the statement of the Government as to its belief of the character of the material, assuming that the Government had information as to the character of the material. There is no question but that the contractor was undoubtedly misled by the erroneous statement in the specifications and there is no question but what his reliance upon such misstatement caused him injury for which under the cases cited he should be relieved. The law is well stated that where one party to a contract makes a statement of belief without the knowledge as to the actual facts, the party making such statements of belief is liable when it turns out to be false, if the other party is injured thereby. The rule is well stated in 13th Corpus Juris, page 388, Section 289-b:

> "Representation Not Believed To Be True. If persons take on themselves to make assertions as to the truth of which they are ignorant, they must in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue. Whether a party misrepresenting a fact knew it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial;

for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false. Where a person makes a misrepresentation of a fact supposed to be peculiarly within his knowledge, whether he knew it to be false or made the assertion recklessly, without knowing whether it was true or false, is wholly immaterial."

We, therefore, respectfully submit that under the rule of damages laid down in the cases *supra* the plaintiff is entitled to recover and that the measure of damages is the expenditures actually made by him in the work, plus a reasonable rental for the plant used and employed, together with a reasonable allowance for overhead and profit. This amount is shown by the plaintiff's evidence and no effort is made to contradict it.

See also Dubois vs. Del. & Hudson Canal Co., 4th Wend. (*N. Y.*) 285; *Ibid.*, 12th Wend. 334; *Ibid.*, 15th Wend. 87; Aiken vs. Bloodgood, 12th Ala. 221.

Recovery on the part of the plaintiff we respectfully submit should be had upon both items and a reasonable amount of the recovery is $69,627.16.

Respectfully submitted,

HORACE S. WHITMAN,
Attorney for Plaintiff.

WM. L. MARBURY,
CHAS. CLAGETT,
Of Counsel.

EXHIBIT "B."

IN THE COURT OF CLAIMS.

SANFORD AND BROOKS CO.)
vs.) No. 95-A.
THE UNITED STATES.)

PLAINTIFF'S MOTION FOR A NEW TRIAL.

Now comes the plaintiff by its attorney and moves the Court to grant it a new trial and to amend the findings of fact as follows:

II.

The plaintiff moves the Court to strike out Finding II and to insert in lieu thereof the following:

> The defendant had no knowledge or information as to the character of the materials to be dredged. When the plaintiff, before executing the contract, applied to the defendant for information, it was given a copy of the specifications which stated that the character of the material to be removed was believed to be mud and sand, and shown the drawing made a part of the contract, but was not told that the defendant had no knowledge or information as to the character of the materials to be removed and was told that the ranges of the various sections of the channel to be dredged had been marked by stakes, said stakes having been placed on the work for the purpose of giving local interests a basis to formulate their deeds, which deeds the government required of them before the project would be begun.

The amendment is asked in order that the findings comply with the actual facts. The record discloses that

the government had no knowledge whatever of the character of the materials to be removed except the information that was acquired by the survey made by Commander Brownell in 1921. The testimony with regard to the knowledge on the part of the government is as follows:

Witness Ernest H. Brownell (R., p. 64):

"10. Question. If is the map that was supplied the contractor on this work. It is entitled 'Broad Creek, Md., from Pocomoke Sound to Little Annemessex River,' and 'Prepared under the direction of Col. Thomas L. Casey,' and contains the following notations:

Mr. Brown, May I ask, has that map been introduced in evidence before?

Mr. Whitman. Yes.

Mr. Brown. What is it, No. 1?

Mr. Whitman. Yes.

11. Question (continuing. 'Hydrography taken from survey of 1891.' That has already been introduced in evidence as Plaintiff's Exhibit No. 1. I will ask you to look at that map and state whether or not you can identify it?

Answer. I made the only survey that was made from October, 1890, to October, 1891. Therefore, on the face of it, this map is certainly a plat of my survey. I have further examined it to some extent, and I recognize my methods of work and, to a consider able extent, I recognize the details of the work. So I am certain it is a plat of my survey. I mean reasonably certain.

12. Question. Well, now, with that plat before you, will you tell us just what investigation was made by you at the bottom of the area to be dredged and what, if any, investigation was made of the charac-

ter of the materials that lay beneath the bottom that would be dredged, in the event that the proposed channel were executed?

Answer. This map shows the character of the surface of the bottom. Such terms as 'Soft mud,' and 'Sand,' 'Hard sand,' 'Soft sand.' Those notes were determined by the feeling of the pole or lead line, probably supplemented by samples taken by greasing the pole or lead line. I am not certain on that point. There were no borings taken during my survey; that is, nothing which would determine the character of the bottom at a greater depth than that to which the pole or lead would naturally penetrate.

13. Question. Now, from your investigation, were you able to determine the actual character of the materials to be removed in the event that a cut of several feet were made along the proposed line of that channel?

Answer. I was not."

Witness John S. Doyle (R., p. 86):

31. Question. In what capacity, do you know, or did Mr. Dorsey state to you in what capacity he was up here—representing himself, or what firm?

Answer. He didn't say at the time. Mr. Dorsey had been coming in this office for many years. I knew him to be a representative of Sanford & Brooks, and I also know him to be in business for himself. When a man comes in to examine the specifications he is not asked whom he represents. I didn't ask Mr. Dorsey whether he represented Sanford & Brooks, or whether he represented himself.

32. Question. Did anybody that you knew to be connected with the Sanford & Brooks Co., with whom this contract was made, come into this office for the particular purpose of getting information?

Answer. No, sir; not to my knowledge.

33. Question. Mr. Dorsey was the only one?

Answer. Yes, sir.

34. Question. Did you or did you not at that time inform Mr. Dorsey that you had little or no definite knowledge as to the bottom, other than by the reports that you had had?

Answer. No, I didn't discuss that proposition.

35. Question. Didn't discuss that?

Answer. No.

36. Question. Did you tell him that——

Mr. Whitman. Mr. Brown, I don't like to interrupt you, but I think that you had better ask your questions not quite so leading, so we can let the witness testify without your suggesting the answers to him.

37. Question (continuing). In your conversation with Mr. Dorsey did you or did you not in any way inform him, or any other of the bidders, that they were to get their own information?

Answer. I don't remember saying definitely that a man should get his own information. I don't remember discussing that part of the specifications. All I remember discussing with Mr. Dorsey is the lines of the work. He came in to see the map, and I remember well having shown him that small map, and he said that was sufficient, and asked me where he could get a copy of it. I told him we didn't furnish those things, but I thought probably he could get a copy from the Chief Clerk. I don't think we discussed the quality of the material in there at all.

38. Question. Did this office at any time since you have been connected with it make a survey of Broad Creek for the express purpose of determining the nature of the bottom?

Answer. No, sir.

39. Question. Or the bed?

Answer. No, sir.

40. Question. For what purpose was the survey made, or any surveys that have been made, since you have been in this office?

Answer. The only surveys since I have been in this office were made to determine—as the work progressed, to determine the quantity of material removed. Cross-sections were taken as the work went forward before the dredging was done, and afterwards, to determine the quantity of material removed. No field survey, excepting the survey in locating that line by Mr. Beckett. Of course, that was in the nature of a survey. He went there and marked off the lines as laid down on the map, but there had been no other field survey during my presence here.

41. Question. Do you know personally whether or not Mr. Beckett, in laying down his lines, made any survey as to the nature of the bottom?

Answer. We had no instructions to that effect and, as far as I know, did not make any such examination. The purpose of laying down those lines was simply to give the local interests who were required to deed certain land to this office before the work was started, a basis on which to formulate their deeds. Some points to which they referred.

42. Question. Did you or did you not, in the course of your conversation with Mr. Dorsey, give him any information which would tend to show him that you had actual knowledge of the nature of this bottom?

Answer. No, sir."

Wintess Doyle (R., p. 95):

"115. Cross-question. Now, both of these maps contain a notation, 'Hydrography taken from survey of 1891.' We placed upon the stand Lieutenant Commander Brownell, of the United States Navy, who testified that he was at one time an employee of the War Department and that he, together with Mr. Beckett and some others, made a survey of 1891.

That is the survey to which you referred, upon which your specifications that were issued in 1914 were based, was it not?

Answer. Yes, sir.

116. Cross-question. And that was the only survey that was made of that area, as far as you know?

Answer. Yes, sir.

117. Cross-question. As a matter of fact, it was the only survey made that this office has any record of?

Answer. I don't know that. I know, as far as I know, that is the only survey that was made.

118. Cross-question. That is the survey upon which your specifications were based?

Answer. Yes, sir."

III.

The plaintiff moves the Court to strike out Finding III and to insert in lieu thereof the following:

The plaintiff began work on November 16th, 1914, at the place and upon the lines designated by an inspector of the defendant as the lines shown in the contract drawing. On December 18, 1914, it was first ascertained that the dredging being done, due to erroneous location by the defendant, was not within the area indicated on the contract drawing. The plaintiff and the defendant had no knowledge until December 18, 1914, that the work had not been located in accordance with the contract drawing. Upon this being called to the attention of the contracting officer, he decided that the error had been made in the location of the work and he directed that the work proceed along the lines improperly laid down until it reached the 6 ft. contour in the channel which was the northermost end of the channel to be dredged. The material the plaintiff dredged outside of the con-

tract lines was harder and more difficult to dredge than the material in the contract lines. Plaintiff dredged 28098 cu. yds. outside of the contract limits at a total cost of $25,429.92, including 15 per cent for overhead and profit and for the same received from the United States $2,972.74 at the contract rate of $.07 9/10 per cu. yd. When it was discovered that the work being done was outside of the contract lines, the plaintiff was directed by the defendant to continue the work outside of the contract lines, because it would have been more expensive for the defendant to have returned to the proper lines. The plaintiff completed the northern end of the channel as directed, but did not protest in writing against doing, so, nor did it file a claim for extra work under article 7 of the contract. It did, however, protest both orally and writing against the payment for the work outside of the contract limits at the contract price of $.07 9/10 a cu. yd. It did make claim for the work done outside of the contract lines and refused to accept the final payment therefor at the contract rates. The material dredged outside of the contract limits consisted of mud, sand, hard sand and clay and all interspersed with logs and stumps. The plaintiff completed the contract on December 12, 1916, and was paid the full contract price for the number of cubic yards dredged. (See references to evidence Plaintiff's Requests V, VI and VII, pp. 104-108.)

Witness Mr. Dorsey (R. p. 70):

"A. I notified Sanford & Brooks.

Q. What else was done?

A. And we went down and saw the engineers, and Sanford & Brooks wrote a letter * * * the Government Engineer in charge of the work. Sanford & Brooks wrote them a letter and General Beach took it up and sent an engineer from the Baltimore office down there to investigate, and we continued to protest, and he advised us to go ahead.

Q. How did he advise you to go ahead?

A. He advised us to go ahead in writing.

Q. On the lines that you were working on?

A. Upon the lines that we were working upon; yes; because he said it would be cheaper to the Government to finish on that line than it would to go back to the original line.

Q. Now, Mr. Dorsey, when you had completed this work, or as you were paid from time to time for the work outside of the lines of the contract, will you please tell us whether or not you accepted such payments as payment in full; or if not, what you did do?

A. No, we never accepted them in full, and we had our counsel take it up with the Government Engineers and they promised us a settlement from time to time.

Q. Well, how long did the negotiations continue?

A. Oh, it continued for several months or longer.

Q. As a matter of fact, didn't it continue for several years?

A. Yes, it has been continuing ever since.

Q. Well, have you ever been paid?

A. No; we never have."

The finding of fact as above requested is all borne out by the uncontradicted evidence in the case, to which reference was made in the original brief. It must be apparent to the Court that the findings of fact as made by the Court are utterly inadequate to sustain a proper presentation of the plaintiff's theory of the law upon that part of the work done outside of the contract lines. The record shows clearly that the contractor did protest and protested vehemently against the location of the line, even before he discovered that it was outside of the

contract limits. He protested against completing the work along the lines when it was discovered that he was at work outside of the contract limits and he protested continuously both orally and in writing as to being paid the contract price for the work outside of the contract lines. His protests were so numerous and so effective that the matter was finally taken up to the Secretary of War, who approved the opinion rendered in the case by Judge Advocate General Crowder. We attach hereto letters and reports appearing in the report of the War Department that relate to this claim as exhibits to this motion for a new trial.

We ask that the Court find also as a part of finding III the following:

> The plaintiff presented its claim to the defendant for work done outside of the contract limits and the defendant held that this work was not covered by the contract and admitted its liability for payment therefor upon a *quantum meruit* and the defendant's officers were directed by the Secretary of War to agree with the plaintiff as to a proper amount to be paid for the work done outside of the contract lines. This the plaintiff and defendant were never able to agree upon, although the plaintiff was tendered $1,382.45 dollars in settlement of this claim (Exhibits attached hereto).

IV.

The plaintiff moves the Court to amend finding IV to read as follows:

> In the bid, the plaintiff stipulated a 20-inch suction dredge with a capacity of about 500 cu. yds. per hour which was approved by defendant. The plaintiff

placed upon the work with the approval of the defendant a 12-inch suction dredge of the same character as the 20-inch suction dredge above referred to, but one that drew less water and that was hence more suitable to the depth of water in which the dredging was to be done. The 12-inch suction dredge was of a character and papacity suitable for dredging in mud and sand as indicated in the specifications. A suction dredge was not the proper equipment to handle the materials actually found upon the site. The maximum capacity of the 12-inch suction dredge in the mud, hard sand, clay and logs that were actually found upon the site of the work was 91 cu. yds. per hour. Upon complaint of the defendant of the slow progress of the work, the plaintiff also placed a clam shell dredge upon the work to facilitate the excavation which the suction dredge was not able to efficiently handle (Dorsey pp. 35-36, qq. 22-25; p. 43, q. 128; p. 44, pp. 15-151).

The above request is made in order that the findings may more nearly correspond to the evidence offered in the case. The evidence is clear that the suction dredge placed upon the work was an efficient dredge in mud and sand and would have completed the work within a specified time. The fact is that the Government granted a long extension of time, due to the fact that the material was not as indicated in the specifications (Rep. of War Dept.).

V.

The plaintiff moves the Court to amend the second paragraph of finding V to read as follows:

> The plaintiff before it made its bid made a preliminary examination of the site of the work, but the line of the channel was not staked off, so the plaintiff could properly investigate the character

of the materials to be excavated. In making the preliminary examination the plaintiff did encounter certain hard materials, but believed that he was off the line of the chanel when these materials were struck and the plaintiff's bid was made relying upon the statement in the specifications that the character of the materials to be removed was believed to be mud and sand. As the work progressed both inside and outside of the contract limits, the materials to be dredged was found to consist of mud, sand, hard sand and hard clay interspersed with stumps and was much more difficult to excavate than was indicated by the specifications. The actual cost to the contractor of dredging within the contract lines with an overhead and profit allowed of 15 per cent. was $62,645.97, for which the contractor was paid at a contract rate fo $.07 9/10 per cu. yd. (See Plaintiff's Request III and IV, p. 104, Plaintiff's Request IX and X, pp. 109-110).

Of course the plaintiff is entitled to a full statement of the facts involved and all that we have asked is borne out by the evidence above referred to.

The Court in its opinion seems to rest its refusal to allow the plaintiff's claim to compensation on a *quantum meruit* basis for the work done outside of the contract lines, upon its failure to make a written protest and to otherwise comply with the provisions of the specifications relating to extra work.

Section 39 of the Specifications under the heading "Claims and Protests" provides that: "If the contractor considers any work required of him to be outside the requirements of the contract, or considers any record or ruling of the inspector of contracting officer as unfair, he shall ask for written instructions or decision imme-

diately and then file a written protest with the contracting officer against the same within three days thereafter, or be considered as having accepted the record or ruling."

It is respectfully submitted that this provision of the contract can have no possible application to the case at bar for the reason that neither party to the contract was aware of the fact that they were working outside of the contract until that part of the work had been largely completed and could not be discontinued and the original contract line resumed without loss to the Government. It is obvious, of course, when they started on this work outside of the contract line, no ruling had been made by the engineer and the defendant simply made a mistake in the location of the work and the plaintiff could not make any protest because he did not know of defendant's error and because he thought, and had a right to think, that he was working within the contract line and could not know, therefore, that he had any right to protest.

It is not claimed by the Government that this work outside of the contract line was work which the contractor was under any obligation whatever to do, or work which the Government by virtue of this contract, had any right to require it to do. It is work, however, which the Government requested the contractor to do, which the contractor did do without any agreement as to the price to be paid for it, and which the Government has accepted and is now enjoying the benefit of.

It is submitted that this claim stands on the same basis that it would stand if this written contract between the Government and the contractor had never been made.

Respectfully submitted,

HORACE S. WHITMAN,
Attorney for Plaintiff.

WM. F. MARBURY,
CHARLES CLAGETT,
Of Counsel.

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EXHIBITS FROM REPORT OF WAR DEPARTMENT.

July 26, 1915.

From: The District Engineer Officer, Baltimore, Md.

To: The Chief of Engineers, U. S. Army, Washington, D. C. (Through the Division Enginer, Eastern Division.)

Subject: Report concerning claim of contractor for dredging Broad Creek, Md.

1. I have to submit the following statement concerning the letter of Mr. W. B. Brooks, President of Sanford & Brooks Co., dated July 7th, but delivered by messenger to this office July 15th concerning certain features in regard to that company's contract for dredging in Broad Creek, Maryland, approved August 13, 1914.

2. The specifications were in general prepared under one of my predecessors in this office, and the work laid out under him, but actual advertisement for bids was delayed owing to the necessity for obtaining title to the lands taken by the cutoffs. This postponed the actual advertising of the work until the summer of 1914.

3. There is inclosed a small map showing the northerly entrance to Broad Creek from Little Annemessex River. The line shown on the map, which was given to prospective bidders, is that marked A, B, C, D, and is the line indicated on the map accompanying the report of preliminary examination, House Document No. 269, 62d Congress, 2d session.

4. Although the contract is with Sanford & Brooks Co., the work is really being done by Mr. W. H. Dorsey on his own account, or by Dorsey & Miller Co. on their own account, having bid under the name of Sanford & Brooks Co., Mr. Dorsey at that time having been connected with Sanford & Brooks Co. The examination, it is under-

stood, of the locality was made by Mr. W. H. Dorsey, and he prepared the bid. The bid submitted states that if awarded the contract, a dredge will be used capable of handling 500 cubic yards per hour.

5. During the first week in January, Mr. W. H. Dorsey made request to move over the first section of the channel. It is believed that this request was verbal, and a copy of letter from this office to Mr Hill, in local charge of the work at that date, is inclosed herewith, and his reply thereto. Some months later Mr. Dorsey appeared at the office and claimed that the first or northerly section of the channel was not given him correctly. An investigation shows that the line laid out for him to dredge is the line X-B, shown on the accompanying map, instead of the line A-B. It appears that when the chief inspector was sent from this office to stake out the land to be taken for cutoffs, he also staked out the northerly stretch of channel. He states that he did this by staking out the 6-foot contour, and then taking that point of the 6-foot contour for the outer edge of the channel, which would make the shortest line; and that he did this also for the reason that this stretch of channel prolonged leads on to the lighthouse, which makes a very good range. This does not agree with the map, but the soundings were taken from an earlier map, and it is possible that the position of the 6-foot contour has changed slightly, although general conditions are as shown. This line was marked by stakes in the swamp. The chief inspector did not, however, report then, or subsequently, that he had varied the line from that shown on the map. In fact, he appears to have been under the impression that the section of channel extending into the Annemessex River was diagrammatic largely and subject to adjustment to secure the best position, and the position selected by him was what he considered best.

6. The contractor now claims that the character of material along the line X-B is different from the line A-B. The inspector states that there is a slight natural channel existing along the line A-B, with a natural depth of from 6 inches to 1 foot greater than along the line X-B; and that there is some soft material on top of the harder

material on the line A-B which does not exist to an appreciable extent along the line X-B; and he reports also that in his opinion the material is somewhat harder on the line X-B than on A-B, at least in spots.

7. This change of line from that on the map given to prospective bidders was not discovered until recently, when the work had advanced too far to justify any change. The contractor seems to believe that he is entitled under those circumstances to be paid a daily price for the use of the dredge while on this line rather than by the yardage under the contract. This does not seem to me to be tenable, unless he had a dredge of the capacity specified in his bid. If the United States were going to make an allowance of this kind, it would be entitled to a dredge of the capacity which was promised. The dredge employed by the contractor is only a 12-inch dredge, and it does not appear fair to the United States to make a per diem allowance for a dredge of this character, when one of so much greater capacity had ben promised and could have been required of the contractor.

8 The case, as far as concerns the movement of the line from its position A-B to X-B, does not appear to me to be one in which the contractor can claim any concession. The material may have been harder on the line X-B, which he actually dug, than the line shown him on the map, but this has not been actually determined, nad its determination after the dredging was done would be difficult and doubtful. Furthermore, it appears to be question as to whether the outer section of the channel was actual or subject to moderate adjustment by the United States at the time of doing the work. Furthermore, the position X-B was more favorable to the contractor for disposing of the material than the line A-B would have been. On the line X-B he could throw the material onto the swamp on the right hand side as the dredge worked inwards. Had the channel been excavated along the line A-B, he would have had to use a longer pipe line to throw the material upon the marsh to the right, or have been required to cut his pipe line at least two or three times a day to allow vessels to pass, had he

attempted to deposit the material upon the nearer swamp to him on the left.

9. Paragraph 39 of the specifications requires the contractor to file a written protest with the contracting officer within three days after any record or ruling of the inspector or the contracting officer has been made which he might regard as prejudicial. This was not done, but there is some doubt as to whether the contractor himself realized the difference in the position of the two lines A-B and X-B until he ha dbeen working several months on the contract. There is no reason to believe that the number of stumps encountered would have been any less on the line A-B than on the line X-B. As it is regarded as only just to treat the contractor equitably, and to make him such allowance, where deserved, as the terms of the specifications will permit, it is stated that this office believes that the contractor should receive such allowance as may be proper, should the Chief of Engineers differ from the interpretation above expressed.

10. There is no question concerning the fact that the contractor is encountering a large number of stumps in the progress of the work, the presence of which stumps was unknown to this office at the time of letting the contract. A record of the stumps encountered was commenced May 10, 1915, and since that time the contractor's dredge in advancing 1,305 feet has encountered 704 stumps, varying from 2 inches to 4 inches in diameter, and from 2 feet to 4 feet long; and 136 stumps varying in size from 4 inches to 12 inches in diameter and from 4 feet to 6 feet long. The contractor has stated to me verbally that when examining the locality prior to submitting his bid he encountered wood several times with the rod, but assumed the wood struck to be drift, and did not imagine that the wood found was stumps in position. The existence of these numerous stumps affects the progress of the work, and owing to their presence any contractor would be unable to make the same progress that this office expected would be made in mud and sand when the specifications were prepared. There is no doubt whatever that had the presence of these stumps

been known, the United States would have had to pay a higher price per cubic yard for the dredging than that under which the contract is being performed.

11. It is believed that owing to this difficulty the contractor is in equity entitled to a longer period than five months for completing the work, and it is recommended that on account of this unforseen difficulty he be allowed ten months extension of time, without cost of superintendence and inspection being charged against him. It is not believed that under all the conditions and circumstances the contractor is entitled to an increased price for doing the work.

LANSING H. BEACH,
Colonel, Corps of Engineers.

4 Inclosures:

Letter from Sanford & Brooks Co., to D. E. O., dated July 7, 1915; Blueprint;

Copy of letter from D. E. O. to Mr. Harry W. Hill, of Jan. 4, 1915, and copy of Mr. Hill's reply, dated Jan. 6, 1915.

Urgent.

Broad Creek 1/12 1st Ind.

Office of Div. Engr., Eastern Div., Army Bldg., New York City, July 29, 1915—

To the Chief of Engineers.

1. This case appears to be similar to that of Christie, Lowe and Heyworth vs. the United States, decided in the Supreme Court of the United States, April 12, 1915, of which a record is printed in the Engineering Record, issue of May 1, 1915. The United States seems to have been at fault in giving incomplete, if not misleading, information as to the character of the materials to be encountered and also in changing the line of the dredged cut. In rebuttal the district officer states that no written protest was made by the contractors within the time limit

set by the specifications and further that the dredge used had less capacity than that described in the proposal under which the contract was awarded.

2. It would appear to me advisable to have the district engineer officer instructed to go into this matter further; to endeavor to formulate the terms of an agreement with the contractor which would be just to him and equitable to the United States; and to report the matter fully to the Chief of Engineers with recommendations. On receipt of this information any action possible or necessary could then be taken by the Department.

3. Inasmuch as a change in district officers is about to be made, it would seem best to have this matter made urgent, in order that the further report may be made by the present district officer before his relief.

W. M. Black,
Colonel, Corps of Engineers.

Inclos. 13-16 accompg.

EXHIBIT "Y."

1585 December 3, 1915.

From: The District Engineer Officer, Baltimore, Md.

To: The Chief of Engineers, U. S. Army, Washington, D. C. (Through the Division Engineer, Eastern Division.)

Subject: Contract with Sanford & Brooks Co. for dredging in Broad Creek, Md.

1. I inclose copy of a letter dated November 27, 1915, from Mr. William L. Marbury, representing the Sanford & Brooks Co., which will explain itself.

2. This question has already been reported on by communications to the Chief of Engineers of July 26, 1916, signed by Colonel Lansing H. Beach, and of August 31,

1915, signed by Major H. W. Stickle (E. D. 93782/19, on a request for extension of time limit.

3. A contract as entered into by the United States with Sanford & Brooks Co., July 31, 1914. The contract time for completion was April 14, 1915. On recommendation from this office, the time limit for completion was extended for a reasonable period, the contractor to pay the expenses of inspection and supervision. Subsequently, upon the recommendation of Major H. W. Stickle, Corps of Engineers, the Chief of Engineers authorized the remission of these charges for a period of three months, or until July 14, 1915. Since that date the charges for inspection and superintendence have been deducted from the contractor. The work on November 30, 1915, was about 70 per cent completed.

4. After the beginning of this work and near the completion of the first section, it was found that a line had been given to the contractor different from what was laid down on the map furnished the bidders. As appears from the previous reports, it was a question as to whether some latitude was not allowed on laying out this line, and also whether, taking it all in all, this new line was not equally as advantageous to the contractor as the old one. Again, it is stated that the contractor has not put on a dredge as stated in specifications, and that the plant is inadequate.

5. Previous reports from this office indicate that it is thought that the contract price should cover the work in this section as in others. The attorney for the contractors make the claim that the contractor should receive a fair price for this work, greater or less than the contract price, as the case may be, giving as a reason that for this changed line, not being part of the contract, the contract price could not hold. While there might be some cases where this would be a good argument, it does not seem so in this case of simply a minor change of line, altering conditions very little, for though the material may have been in the new line somewhat harder than the old, the other conditions for dredging, such as disposal of material, were better. It is not believed, therefore, that

the contractor has a good case, though the extension of time was authorized on this basis.

6. The second point made by the attorney is that the material found was much harder than appeared from the specifications, and that the price bid was too low. This is admitted. He states that it is similar to the case of Christie, Lowe & Heyworth vs. the United States. This is not admitted in any way, as stated in the indorsement of the Chief of Engineers office of August 2, 1915 (E. D. 93782/19).

7. From the previous reports on this subject, it appears that all information known in the office was given the bidders and nothing was held back. It may be a question whether further investigation should not have been made by this office, but, as far as I can learn, there is no question but what all information was given. Furthermore, sufficient time was given to the contractor to make his own investigations, and, according to previous report, he did so and found occasional stumps, but did not think them of sufficient importance to warrant putting in a higher bid. These two points differentiate the case entirely from the case of Christie, Lowe & Heyworth vs. the United States.

8. It would seem that the information given the contractors was mostly based on an old survey and, in my mind, it would, of course, have been better to have endeavored to determine more about the bottom by some borings when at least the harder material, if not the stumps, would have been discovered. This, however, was not done and, as far as I can learn, no such information was obtained.

9. It is recommended that the Sanford & Brooks Co., through its attorney Mr. Marbury, be notified that the United States can not consider either of the points advanced by them.

JOHN BIDDLE,
Colonel, Corps of Engineers.

1 Inclosure:

Copy of letter from Mr. Wm. L. Marbury, dated November 27, 1915:
Broad Creek 1/19 1st Ind.

Office of Div. Engr., Eastern Div., Army Bldg., New York City. Dec. 4, 1915—

To the Chief of Engineers:

Attention is invited to my opinion given in the 1st indorsement, dated July 29, 1915, in E. D. 93782/19. In view of the decision of the Chief of Engineers in the 2nd indorsement on the same paper, no action save that recommended by the district engineer officer seems possible.

W. M. Black,
Colonel, Corps of Engineers.

Inclo. 20 accompg.
93782/29 2nd Inc. JAW:AMC

Office of C. of E., Dec. 9, 1915—To the SECRETARY OF WAR:

1. In obedience to instructions contained in memorandum of August 2, 1915, herewith (E. D. 93782/24) this case is submitted for such action as may be deemed proper.

2. The action of this office of September 4, 1915 (5th indorsement on E. D. 93782/19) is that which the contractor is regarded as entitled to under the terms of the contract.

Dan C. Kingman,
Chief of Engineers, U. S. Army.

Inclosures 19-28 and 30 accompg.
Assistant and Chief Clerk, War Dept., Dec. 10, 1915.
Asst. Secy's Office, War Dept., Dec. 11, 1915.
J. A. G. for review.
Rec'd Dec. 13, 1915, J. A. G. O.

76-741 4th Ind.

War Dept. J. A. G. O., December 18, 1915—To the Secretary of War.

1. The views of this office are desired with reference to the claim of the Sanford-Brooks Company, by W. L. Marbury, Attorney, for additional compensation arising out of their contract dated July 31, 1914, for dredging in Broad Creek, Maryland. The claim is submitted under two heads, namely::

(a) For dredging from Station 1 to Station 17 plus, 50, where the channel to be dredged was staked out by the Government along the line X-B instead of along the line A-B, as shown on the map with reference to which the contract was made:

(b) For dredging from Station 17 plus 50 to the limits of the project.

2. *As to Station 1 to Station 17 plus 50.*

It appears that in staking out the work, the Chief Inspector for the Government staked it out along the line X-B which varies from the line A-B, from 0 to 300 feet; that the line A-B is the one shown on the map with reference to which bids were invited and to which the contract refers, said map being marked "Broad Creek, Maryland, from Pocomoke Sound to Little Annemessex River, January 16, 1911"; that the contractor made no protest against any change in the line from that covered by the contract, but it would seem that the variance was not discovered by either party until several months' progress had been made in the work; and that by reason of this fact the contractor can not properly be held to the requirement of paragraph 39 of the specifications that a written protest must be filed with the contracting officer within three days after any record or ruling of the inspector or the contracting officer is made which the contractor might regard as prejudicial.

On behalf of the contractor it is claimed that the work along line X-B is more difficult than that along the line covered by the contract, assuming the material along the

latter line to be mud and fine sand as represented in the specifications (par. 22). The material encountered along the line X-B is described as "being hard, tough clay, interspersed with a number of stumps"; and it is stated that the results of the operation of the dredge in this cut show the difficulty in dredging the material, and particularly "the small yardage that it was able to put out on account of the character of this material."

With reference to the difference in character of material along the line X-B from that along the line A-B, the Government Inspector states that there is a slight natural channel existing along the line A-B with a natural depth of from 6 inches to 1 foot greater than along the line X-B, and that there is some soft material on the top of the harder material on the line A-B which does not exist to an appreciable extent along the line X-B, and that in his opinion the material is somewhat harder on the line X-B than on the line A-B, at least in spots. There appears to be no dispute as to the difficult character of the material encountered along the line X-B; or that the change in the line from that on the map shown to prospective bidders was not discovered until the work had advanced too far to return to the original line. The work on the range X-B was completed in 107 working days during which the suction dredge was operated for a total of 694 hours during which it dredged an average of 42 cubic yards per hour. This range was completed on April 24, 1915, and since that date to July 31, 1915, the dredge has worked 76 days in the balance of the project, or a total of 559 hours, with an average of 91 cubic yards per hour, more than twice the average on the range X-B. Moreover, it is claimed by the contractor that if the material in either section of the work were of the character described in the specifications, the average per hour should be 200 yards. In view of the work accomplished in the channel X-B as compared with that in the remainder of the project, the contractor was granted an extension of 58 days, without deduction of expenses of superintendence, etc.

It is claimed on behalf of the contractor that the work from Station 1 to Station 17 plus 50 is not covered by the

contract, and that the contractor should, therefore, be paid whatever would be a fair price for the work without regard to the price fixed in the contract. In other words, it is claimed that reasonable compensation should be made for the use of the pump dredge and her equipment per day for the entire time (107 days) employed on this portion of the channel. With reference to this claim the U. S. Engineer at Baltimore, Maryland (Major H. W. Stickle, Corps of Engineers), states that the modification of the location of the entrance range from A-B to X-B "seems to be a minor change, permitted under the specifications, to the contracting officer," and that "there is no reason to believe that the cost of the work or the time for doing it was materially increased thereby," and that "the contractor is not entitled to additional compensation because of the change beyond the extension of three months without cost of superintendence and inspection being charged against him."

The review of this office on this point will be given following the consideration of the claim for belief because of the difference in the character of material encountered from that represented in the contract, which claim applies to both sections of the work.

3. *As to Station 17 plus 50 to the limits of the project.*

Under this head, it is claimed that the contractor is entitled to relief because of the difference in the character of the materials encountered from that described in paragraph 19 of the specifications where the material is described as "believed to be mud and fine sand." It is claimed that the materials actually encountered were "hard, stiff clay, interspersed with numerous stumps ranging from 3 to 12 inches in diameter;" that while the specifications provided that bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly, the Government must have known that there was other materials than "mud and fine sand;" and that, therefore, under the decision of the Supreme Court in *Christie, et al.*, vs. United States (237 U. S. 234), the contractor is entitled

to relief. It is conceded by the Engineer Department that the material encountered is more difficult throughout than that which would have been expected from the specifications; that the price for this work is much too low in any event, considering the location of the channel, its dimensions and the small quantity to be dredged; that a large number of stumps were encountered in the progress of the work; that since May 10, 1915, the contractor's dredge in advancing 1305 feet had encountered 704 stumps varying from 2 to 4 inches in diameter, and from 2 feet to 4 feet long, and 136 stumps varying in size from 4 inches to 12 inches in diameter, and from 4 feet to 6 feet long. In his report, dated July 26, 1915, the district engineer officer says:

> "The contractor has stated to me verbally that when examining the locality prior to submitting his bid he encountered wood several times with the rod but assumed the wood struck to be drift and did not imagine that the wood struck was stumps in position. The position of these numerous stumps affects the progress of the work and owing to their presence any contractor would be unable to make the same progress that was expected would be made in mud and sand when the specifications were prepared. There is no doubt whatever that had the presence of these stumps been known, the United States would have had to pay a higher price per cubic yard for the dredging than that under which the contract is being performed."

With reference to the statement that the Government must have known that the material differed from the represented, the district engineer officer in his report dated August 2, 1915, says::

> "The contract, by paragraph 22 of the specifications, advised bidders as to the nature of the materials to be removed *to the extent of the knowledge of the contracting officer, and added* the usual caution that bidders should examine and decide for themselves as the United States *does not guarantee* the accuracy of the description. The contractor, as a

bidder, heeded the caution and made examinations, and found wood. Whether or not he examined the channel A-B or the channel X-B, or any other locality, he expected to encounter wood. That he mistook its nature is a matter of which he must assume responsibility.

* * * In this case the *Government agents did not*, as understood, *know that the statements as to materials were erroneous*, and the contractor before preparing his bid had time to, and did make borings and found the information to be incomplete."

4. So far as respects the claim that the contractor is entitled to relief because of the difference in the character of the materials actually encountered from those represented in the specifications, this case is substantially similar to that of the Atlantic Dredging Company (Sanford-Brooks Company, sub-contractor for dredging in the Delaware River, which case is now pending before the department, if we omit the question of the supplemental contract involved in that case. In that case this office, after comparing the facts with those involved in the case of *Christie, et al.*, vs. *United States*, *supra*, said:

"There is a clear distinction between the cases relied upon in the brief and the one under consideration. Here there is *no positive misrepresentation of fact*, but of belief only, and the bidders were informed that this belief rested on test borings made within the areas and they were invited to examine 'the results thereof' as shown on the maps on file in the engineer's office, with the caution that while the information given thereby was believed to be trustworthy, '*no guarantee* is given of the correctness of these borings as representing the character of the bottom over the entire vicinity in which they were taken.' * * * In short, the case of *Christie, et al.*, vs. *United States* turned on positive misrepresentation of fact, and comes, therefore, within the well established rule with respect to relief on the grounds of misrepresentation."

It was therefore the view of this office in that case that the contractor had no legal claim for relief and further that the Secretary of War was without authority to relieve the contractor from the full performance of his contract, or to authorize any additional compensation beyond that specified in the contract for such performance.

5. Under the facts as they appear from these papers, I think the reasons here given would prelude any relief based on the alleged misrepresentation as to the character of materials.

6 With respect to the dredging performed on the line X-B, it appears, as stated above, that this line was staked out by the Government Inspector and that the contractor, in ignorance of the fact that the line was not located to conform to the one described in the contract, proceeded with the work until such progress had been made that it was impracticable to return to the line of channel covered by the contract. It further appears that the dredging in the line so erroneously staked out was not only much more difficult than described in the specifications, but was considerably more difficult than dredging in the channel covered by the contract. I do not think that this change can be considered as a minor change, which the engineer officer is authorized to make under the terms of the contract, and therefore am of opinion that this work must be regarded as not covered by the contract, and that, therefore, the contractor is entitled to a *quantum meruit* compensation for the same. In determining this compensation, the sole question is as to the value of the work, in view of the time consumed therein as affected by the material encountered. In making this determination it is not proper to consider that the effect of the change was to release the contractor from the work on the line A-B, which he might have been required to perform, although more difficult than represented in the specifications. This being extra work and not covered by the contract, the sole question to be determined is that of a fair compensation for its performance. If this view be approved, I think the papers should be returned with a view to an agreement with the contractor as to a fair compensation for the dredging

of the channel X-B, and when this is determined, I think the question should be submitted to the Comptroller for his decision as to whether additional payments can be made for this work on the basis agreed upon; and further, whether a supplemental contract should be made to cover the additional work.

E. H. CROWDER,
Judge Advocate General.

10 Incls.

Asst. Secy's Office, War Dept., Dec. 20, 1915.

Approved:

HENRY BRECKINRIDGE,
Asst. Secy. of War

Dec. 20, 1915.

Dec'd Back, Office Chief of Engrs., Dec. 22, 1915.

Incs. 19-28 & 30 and 1 add'l inc. (31) accompg.

[illegible]/29 6th Ind. SAM--EEN

Office, C. of E., December 23, 1915—To the District Engineer Office, Baltimore, Md.

1. Referred, for compliance with the course of action outlined in paragraph 6 of the opinion of the Judge Advocate General.

By command of the Chief of Engineers:

J. A. WOODRUFF,
Major, Corps of Engineers.

Inclos. 19-28 and 30, 31 accompanying.

Rec'd. B'k U. S. Engr. Office, Balto., Md., Dec. 24, 1915.

7th Ind. JB-AGZ

U. S. Engineer Office, Baltimore, Md., June 23, 1916—

To the Chief of Engineers.

1. Returned.

2. An effort has been made to come to an agreement with the contractor as to the amount to be paid for this extra work. It has been impossible to do so. The claims of the contractor are, in my opinoin, entirely beyond reason. It seemed better to conduct the case by correspondence, although several interviews were held with the subcontractor and with the attorney to the contractor. The letters received from the contractor and his attorney were so indefinite, in response to communications from this office, as to be of little value. An effort was made, without avail, to have the contractor agree to a division of the work within and outside contract limits, although no evidence was submitted by him to controvert the records of this office.

3. At the request of the contractor, the case is, therefore, submitted. Report is appended, and the various communications involved.

JOHN BIDDLE,
Colonel, Corps of Engineers.

23 Inclosures:

E. D. 93782/19-28, 30 & 31 and Report dated June 23, 1916, with its 10 inclosures.

Crisfield, Md.
April 21, 1915.

From: William A. Brack, Inspector.

To: Colonel Lansing H. Beach, Corps of Engineers, U. S. Army (Through Mr. John S. Doyle, Assistant Engineer).

Subject: Examination of Broad Creek, Md.

1. The small clam shell dredge "No. 1" owned by the Crisfield Sand & Dredging Co. was placed on the work by the contractors on April 15th for the purpose of examining the channel by dredging at certain points along the creek, to decide as to the character of materials to be dredged.

2. Excavations were made in the channel to a depth of 4 to 7 feet at stations 30 plus 00, 33 plus 00, 37 plus 00, 42 plus 50, 54 plus 00 and 66 plus 50 which showed clay and sand at a depth of 2 to 4 feet and stumps varying in size from 2 to 5 feet in length and from 3 to 10 inches in diameter. At stations 72 plus 00 and 78 plus 00 clay was found at a depth of 4 feet, and at station 90 plus 00 soft mud was found to a depth of 11 feet.

3. An examination was also made of the first reach of the channel, which showed that this channel is 70 feet west, at station 17 plus 50, or the south end, and 195 feet at station 11 plus 50, of the location as shown on blue print. Soundings were made in the channel, with a steel rod, which showed sand and mud, and clay in some places at a depth of 5 feet. If the center line of the present channel had been shifted about 60 or 70 feet to the east at the south and leaving the north end go approximately to the lighthouse as at present it would have reduced the depth of hard clay digging from 2 to 3 feet.

4. Dredge No. 1 was placed on the work on April 15th and withdrawn on April 19th when the examination was completed.

WILLIAM A. BRACK.

AFFIDAVIT OF COUNSEL.

DISTRICT OF COLUMBIA, SS:

Personally appeared before me, a Notary Public, in and for the aforesaid District of Columbia, Horace S. Whitman, who being duly sworn according to law states:

That he is Attorney in the Court of Claims for the Appellant herein, and assisted in preparing the pleadings therein, and he is familiar with the evidence taken in said cause.

That Exhibits "A" and "B" are true copies of records filed in the Court of Claims.

That claimants motion for new trial was filed in the Court of Claims within the time prescribed by the rules of said Court, wherein reasons were given for the proper and further findings of said Court, reference being made to Exhibit "B" herein filed, and which motion was overruled on the 4th day of June, 1923, by the said Court of Claims.

Subscribed and sworn to before me this 2d day of ~~December~~ January, 1924.

Notary Public.

Office Supreme Court, U. S.
FILED
JAN 10 1925
WM. R. STANSBURY
Clerk

NO. 175. OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

SANFORD AND BROOKS COMPANY OF MARYLAND

v.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

HORACE S. WHITMAN,
Attorney for Appellant.

WILLIAM L. MARBURY,
CHARLES CLAGETT,
Of Counsel

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NO. 175. OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

SANFORD AND BROOKS COMPANY OF MARYLAND

v.

UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement Of Case.

This case comes up on appeal from the Court of Claims. A motion to remand to that Court for further findings of fact has been filed herewith and necessitates a short statement of the case.

The controversy which gives rise to this cause sprang out of a contract between the appellant company, hereafter called the contractor, and the United States, hereafter called the Government, for the dredging of a channel through Broad Creek, in the vicinity of Crisfield, Maryland. The contract provided for a specified channel and a stated price per cubic yard of material dredged. Due to an error by the Government inspector the work was instituted along the wrong lines from the very start,

and the contractor proceeded, dredging a channel along the wrong location, for a period of more than a month before the error was discovered by either party. Upon discovery of the error, the contractor notified the inspector, who took it up with the proper officials and it was decided that the contractor should continue dredging outside of the contract limits for a considerable distance. This the contractor did, the material thus dredged being more difficult than that contemplated by the contract. During the progress of the work the contractor claimed recovery for the work so done outside the contract limits on a *quantum meruit* basis, and the Government admitted its liability upon this basis; however, no final arrangement was ever come to and the contractor has been paid only the contract price for the work done, which is not reasonably adequate compensation. This cause arises from the further prosecution of that claim.

The specifications issued by the Government contained the following provisions:

> 30. "The work is to be carried on at such localities and also in such order of precedence as may be found necessary by the contracting officer. The location and limits of the work to be done will be plainly indicated by the contracting officer or his agents, by stakes, ranges or otherwise. * * * "
>
> 39. "If the contractor considers any work required of him to be outside of the requirements of the contract or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within three days thereafter, or be considered as having accepted the record or ruling."

40. "The right is reserved to make such minor changes in the execution of the work to be done under these specifications as in the judgment of the contracting officer may be necessary or expedient to carry out the intent of the contract, provided that the unit cost to the contractor of doing the work shall not be increased thereby. * * * "

The contract contained the following provisions:

"Article 6. If, at any time during the life of this contract, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve a material change in the character or quantity of labor or material to be furnished, or in any other provision of the contract, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, or the other provisions thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War. PROVIDED, that no payments shall be made in accordance with such supplemental or modified agreement unless the same was signed and approved before the obligation arising from such modification was incurred."

"Article 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers."

The claim of the contractor fell naturally into two parts:

1. For work done outside of the contract lines, the contractor asserting the right to payment for that work upon *quantum meruit*.

2. For work done inside of the contract lines, the contractor claiming that he had relied on certain false representations made by the Government as to the character of materials to be dredged.

The Court of Claims decided against each of the contractor's contentions and entered judgment for the Government.

So much of the claim as was related to the work done inside the contract lines is not pressed. On the other hand, the Court failed to make any finding on several issues produced by the contractor's claim for work done outside the contract. The resolution of these issues is deemed to be essential to a proper presentation of the contractor's case and it is his contention that the failure of the Court to make these findings amounts to an error of law. Hence this motion to remand.

THE FINDINGS OF THE COURT OF CLAIMS.

The findings of the lower Court relevant to this appeal are set forth at length in the motion to remand. As there explained their substance may be summarized as follows:

Finding I states that the contractor entered into a contract with the Government whereby it agreed to dredge Broad Creek at a given rate per cubic yard. The

finding incorporates by reference the contract itself, the relevant provisions of which have been given.

Finding II relates entirely to that part of the contractor's claim which deals with false representation, and which is not pressed.

Finding III may be stated as follows:

The contractor began work along the lines indicated by the Government inspector. After the work had progressed for over one month, it was for the first time discovered that the work was proceeding outside the contract limits. The contractor called this to the attention of the contracting officer who acknowledged the Government's error, but ordered that the work proceed on the wrong location until the contract lines were regained. The contractor executed this order without *written* protest, nor did it obtain a *written* order for this work duly approved, and it accepted the full contract price for the work so done, without *written* protest. The material dredged outside the contract lines was 28,098 cubic yards.

Finding IV shows that the contractor, in his bid, promised a twenty-inch dredge. That this was not called for by the contract and that with the approval of the Government, the contractor substituted a twelve-inch dredge. In the material found this proved insufficient, and a clamshell dredge was added after complaint by the Government and with its consent. This finding has no relevance to the question raised by this appeal, bearing

only on the question of damages from false representations. There has been no contention made in this case that the contractor defaulted in any way, or failed in performing the contract as provided by the Government. This finding may be dismissed from consideration.

Finding V, except for the last sentence, relates only to that part of the contractor's claim which is not pressed. The last sentence states that the material to be dredged was found to consist of mud, sand, hard clay and hard sand, with some stumps interspersed.

This completes the findings of the Court.

THE FACTS FOR THE PURPOSES OF THIS APPEAL.

The contractor requested findings both at the trial and on the motion for a new trial, which have been set forth in full in the motion to remand. The findings thus requested were entirely ignored by the Court which found neither the one way nor the other on all these points. They appeared to deem these facts immaterial as a matter of law. These findings were amply supported by the evidence, which was, in most instances, undisputed, and had they been accepted by the Court of Claims, the facts in the case would have read as follows, (the points as to which the Court made no finding, in italics):

> "The plaintiff began work on November 16, 1914, at the place and upon the lines indicated by an inspector of the Government *as the lines shown in the contract drawing.* On December 18, 1914, it was *first* ascertained that the dredging being done was not within the area indicated upon the contract drawing, due to *erroneous location by the Government's*

inspector. The plaintiff and defendant had no knowledge until December 18, 1914, that the work had not been located in accordance with the contract drawing. This was called to the attention of the contracting officer, who decided that an error had been made *by the Government's inspector* in the location of the work, *but that it was impracticable to abandon the work in the location in which the contractor had been working and to re-locate the channel in accordance with the contract, especially because it would have been more expensive to do so. Over the protest of the contractor* the contracting officer directed that the work proceed along the wrong location until it reached a point which coincided with the location as laid down in the contract, and thence upon the proper location. The plaintiff continued the work outside of the contract limits without protest in writing, nor did it make a claim for extra work in accordance with the provisions of the contract, *but it did protest orally to the contracting officer against such proceedings and protested to the same officer orally against the payment for the work done outside of the limits at the contract price.* It accepted the contract price for the material dredged outside the contract limits, *but not as final payment therefor. During the progress of the work the plaintiff presented its claim to the contracting officer for the work done outside the contract limits and demanded payment upon quantum meruit. This claim was referred to E. H. Crowder, Judge Advocate General, who held that the work was not covered by the contract and admitted the Government's liability for payment therefor upon a quantum meruit. The defendant's officers were directed by the Secretary of War to agree with the plaintiff as to a proper amount to be paid for the work done outside of the contract line. This the plaintiff and the defendant were never able to agree upon, although the plaintiff was tendered $1,382.45 in settlement of this claim.* The plaintiff continued the work outside of the contract limits *until about the 15th day of May, 1915. The distance that the contractor dredged outside of the contract limits was*

about 1,750 feet. The amount of material dredged outside of the contract limits was 28,098 cubic yards *at a total cost of $25,429.92, including 15 per cent. for overhead and profit, which expenditures were reasonable in consideration of the character of the materials found and plant employed.* The material dredged outside of the contract limits consisted of mud, sand, hard sand and hard clay with some stumps interspersed. The plaintiff completed the contract on December 12th, 1916, and was paid the full contract price, namely, $2,972.74, for the number of cubic yards dredged. *It received no other compensation.*"

On this appeal we are asking this Court to remand to the Court of Claims for finding on several points. In order to determine whether or not this case should be remanded, the Court must first decide that the findings requested by the contractor, had they been made, would have brought about a different result. To determine this question it is necessary for the Court to assume that the facts, on the points as to which the Court of Claims made no findings, would have been found to accord with the findings requested by the contractor and the evidence presented by it. Therefore, for the purposes of this appeal, we must assume that the narrative just set forth is a true statement of the facts.

THE ARGUMENT.

The contention of the contractor is, shortly, this: That the provisions of the contract on which the Court of Claims relied were inapplicable to the work for which this claim is made. It has dredged a channel under the order of the Government's contracting officer, and this action has been approved by the Secretary of War, and

the fruits of this labor have been enjoyed by the Government, and the contractor is accordingly entitled to a reasonable compensation for the work done, as on an implied contract. This it has not received. It contends further that it is entitled to this reasonable compensation on the facts as found by the Court of Claims, as well as on those facts which must be taken to be true on this appeal. In support of this contention it urges two propositions:

I. On the findings of the lower Court the written contract never applied to the work for which this claim is made.

II. On the facts which were embodied in the findings requested by the contractor, and supported by the evidence, and which we assume to be true for the purposes of this appeal, if the written contract or the provisions therein as to extra work ever applied, they were abandoned and a supplementary oral agreement entered into by the proper authorities, as to this work, binding on the Government as well as the contractor.

I.

ON THE FINDINGS OF THE LOWER COURT THE WRITTEN CONTRACT NEVER APPLIED TO THE WORK FOR WHICH THIS CLAIM IS MADE.

The Court of Claims found that the Government inspector, clothed with full authority to locate the work, started the contractor at work along the wrong location, and that this error was not discovered by either party until the contractor had been dredging for more than one month. The channel actually dredged was entirely other than that contemplated in the bid, specifications and contract; it was different in length, location and the

character of the materials to be dredged. (See Motion to Remand, Exhibit "B," p. 32). We respectfully submit that it was erroneous for the Court to find the provisions of the contract applicable to so much of the work as was done before this error transpired.

The provisions of the contract requiring written protest, and a written order for the work, were not complied with for a plain reason,—it was impossible. The proposition of the Court amounts to this: "The inspector ordered certain work done. This work was not covered by the contract. The contractor had no reason to know that fact, and was bound to follow the directions of the inspector. However, the contract provides that there shall be no recovery for work done outside the contract unless certain formalities are complied with. It is true that these formalities were not complied with for the reason that the inspector's error was not known to either party, and the situation to which they were applicable never arose. Nevertheless, when the error did transpire, it was their duty to proceed as though they had known it in the first place; and their failure so to do prevents them from recovering for the work done up to that time." The argument thus stated seems to us unsound. The contract made no provision for work done under a mistake induced by the Government; its provisions assumed that the parties were aware that the work ordered was beyond the contractor's obligation. These provisions are plainly inapplicable. The situation was not contemplated by the parties and not covered by the written agreement.

Turn to the completion, after the discovery of the error originally made, of the channel thus erroneously begun. It may be urged with more show of reason that the contract applied to this part of the work. But this contention is open to the same fundamental objection. The specifications, bid and contract related to an entirely different channel from that which was actually undertaken and completed. The provisions in the written contract as to time, as to the character of the plant to be used, as to the price to be paid per cubic yard, were all supposedly based on the length, location and character of the bottom of a certain specified channel. When that channel was abandoned all these provisions became automatically inapplicable. They might have been scandalously profitable—they were disastrously unprofitable to the contractor. We call to the Court's attention two cases in which this Court regarded changes of less sweep in the construction of Government work as being sufficiently material to make written contracts inapplicable.

United States v. Axman, 234 U. S. 36.
Henderson Bridge Co. v. McGrath, 134 U. S. 260.

One question may be asked to test the soundness of the conclusion of the lower Court on its own findings of fact. Suppose that the contractor had erroneously been directed to begin work in a neighboring river or across the bay or anywhere except on the location contemplated by the contract. Would the written agreement made in this case have applied regardless of the conditions actually met with? And in what way would the situation

have been altered by the discovery of the error in the midst of the progress of the work?

Without laboring the point more, we feel entitled, for the purposes of this appeal, to treat the written contract as though it had never been made, and to disregard it. The law is then plain on the decisions of this Court. The contractor has performed labor for the benefit of the Government. He was directed to do so by an agent of the Government with power to make written contracts of this character. No written agreement was made. He is nevertheless entitled to compensation, "as upon an implied contract for a *quantum meruit*."

Clark v. United States, 95 U. S. 539.
Harvey v. United States, 105 U. S. 671; 113 U. S. 243.
Freund v. United States, 260 U. S. 60.

There remains but one objection to recovery. The lower Court found that the contractor accepted, without written protest, the payment of the contract price. This, however, was not accepted as payment in full. The rule is accordingly clear under the authorities that there is nothing to prevent a claim for additional compensation being made in such a case. *Freund v. United States*, 260 U. S. 60, 69. Cf. *United States v. Garlinger*, 169 U. S. 316; *Phoenix Bridge Co. v. United States*, 211 U. S. 188; *Williston, Contracts*, Sec. 1854.

II.

ON THE FACTS WHICH WERE EMBODIED IN THE FINDINGS REQUESTED BY THE CONTRACTOR, AND SUPPORTED BY THE EVIDENCE, AND WHICH WE ASSUME TO BE TRUE FOR THE PURPOSES OF THIS APPEAL, IF THE WRITTEN CONTRACT OR THE PROVISIONS THEREIN AS TO EXTRA WORK EVER APPLIED, THEY WERE ABANDONED AND A SUPPLEMENTARY ORAL AGREEMENT ENTERED INTO BY THE PROPER AUTHORITIES AS TO THIS WORK, BINDING ON THE GOVERNMENT AS WELL AS THE CONTRACTOR.

It would perhaps be well to ascertain the exact provision in the contract on which the Government relies in this case. Article 40 of the specifications, giving the contracting officer power to make minor modifications, does not apply. The work performed in this case is not a minor modification within the meaning of this provision, and the Government has made no attempt so to construe it. (Cf. *United States v. Stage Company*, 199 U. S. 414, in which case it was held that a change in postal routes was not a minor modification within the meaning of a Government contract. See also Report of E. H. Crowder, Judge Advocate General, Exhibit "B," page 29). There remain Article 6 and Article 7 of the contract. It will be observed that distinction is taken between "extra work" and "material changes." It will plainly appear that the Court of Claims might better have rested its decision on Article 6 which refers to material modifications rather than on Article 7, as was actually done by them. The work done in this case seems to be so entirely different from that contemplated by the contract that it cannot come within the definition of "extra work." Force is given to this contention when that part of Article 7 is noted which requires the ap-

proval of the Chief of Engineers for the prices and quantities of the extra work ordered. In our case, of course, it was physically impossible to ascertain this. However this may be, the result will be unchanged.

Provisions of this character are, of course, valid, and in the absence of circumstances indicating that they have been superseded, must be fully complied with; being in this respect exactly like other provisions of a contract. This the contractor does not dispute. The contention is rather this, that the contract as originally drawn was abandoned by common consent, and a new agreement substituted in its place. The facts supporting this contention are unambiguous. The undisputed evidence offered by the contractor, and embodied in the request for findings, was that upon discovery of the error in location, the contractor immediately informed the engineer in charge. This official referred the matter to the contracting officer, head of the department of engineers in that region, who was of the opinion that it was impracticable to return to the proper channels, and would be less expensive to the Government to continue the work outside of the contract. The contractor protested vigorously against this course, pointing out that the channel then being dredged involved much more work. He continued the work on a clear understanding that it was outside the contract and should be compensated as such. When payments were made to him at the contract price, he again protested and entered his written claim with the contracting officer. This claim was referred, first, to the Chief of Engineers, and by him to the Judge Advo-

cate General, who had no hesitation in upholding its validity. He then referred the matter to the Secretary of War, who approved the action of the contracting officer in ordering the completion of the channel along the wrong location, and referred the matter to the Chief of Engineers, with instructions to proceed in accordance with the opinion of the Judge Advocate General, and to come to an agreement as to the extra compensation to be paid, such compensation to be on a *quantum meruit* basis. (See Exhibit "B," p. 30, Report of War Department).

We feel justified in particularly calling to the attention of this Court the fact that the Government has undertaken to deny all liability in this case after liability had been admitted by the head of both departments of the Government which were concerned in this controversy.

It would seem difficult to understand why the Court of Claims found the provisions of the written agreement applicable to such a situation. All provisions of a contract are subject to alteration by common consent of the parties, and provisions requiring that extra work be ordered in writing are no exception to the rule. This proposition was forcibly stated by HOLMES, J., in *Bartlett v. Stanchfield*, 148 Mass. 394, and is supported by the unanimous chorus of authority. We quote his words: "Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiffs and defendants, no doubt. But it cannot be assumed, as a matter of law,

that the contract governed all that was done, until it was renounced in so many words, because the parties had a right to renounce it in any way and by any mode of expression they saw fit. They could substitute a new oral agreement by conduct and intimation as well as by express words." See *Headley v. Cavileer*, 82 N. J. L. 635, exhaustively annotated in 48 L. R. A. (N. S.) 564. Nor are contracts for public works any exception to this rule. The same standard has been for long accepted in the Court of Claims, and through constant application to controversies arising out of Government contracts, corallaries have been deduced to meet specific situations as they arise. A quotation from *Barlow v. United States*, 35 Ct. Clms. 514, 547, will serve as illustration:

> "As such provisions in contracts are constantly causing disputes and controversies we now formulate the principles governing them, which we regard as well settled.
>
> 1. Where additional work or better material than the contract requires was ordered by a subordinate officer having no such authority, the compliance of the contractor must be regarded as voluntary service and no contract can be implied even though the defendants acquired a benefit by the change, that is to say, the Government cannot thus be compelled to build a better building than was intended by its responsible contracting officer. (*Driscoll's Case*, 34 Ct. Clms. 508, and cases cited p. 524).
>
> 2. Where, on the contrary, the alterations or additions were ordered by an officer clothed with responsibility and authority to contract, a contract will be implied to the extent of the benefit which the defendants have received and the claimant will recover in *quantum meruit*. (*Hawkins v. United States*, 96 U. S. 689).

3. Where a contract expressly provides that alterations or additions must be ordered in writing, and the cost be agreed upon before the work be done, the principals to the contract, in ordinary cases between individuals may waive the requirements; so in the case of Government contracts, the officer who has authority to order or agree in writing must be considered *pro hac vice* as the principal, and if he orders a change orally, and the contractor acts on the order and performs the extra work, the parties will be deemed to have mutually waived the requirement. (*Ford's Case*, 17 Ct. Clms. 75).

Nor has the point gone unremarked in the decisions of this Court. *Hawkins v. United States*, 96 U. S. 689, gives the rule clear recognition. In that case a claim was made for extra work, the contractor asserting that it had been ordered by the Government's agents superintending the work. The contract provided that all claims of this character were to be supported by written orders of the Secretary of the Treasury. Mr. Justice CLIFFORD, in denying the claim acknowledged the principle for which we contend. He said (p. 694):

"* * * beyond doubt it is true that subsequent oral agreements between the parties to a written contract not fully within the statute of frauds, if founded on a new and valuable consideration, may, when made before the breach of the written contract, have the effect to enlarge the time of performance specified in the written instrument, or may vary any other of its terms, or may waive and discharge it altogether. Concede that proposition in its fullest extent, and yet it cannot benefit the claimant, as the findings of the court furnished no ground whatever to show that any subsequent parol agreement was ever made between the contracting parties to vary, enlarge or diminish any of the terms of the written contract, nor is anything of the kind pretended by the ap-

> pellant. What he alleges is that he was required by the assistant superintendent to furnish better stone than that specified in the written agreement * * * there is not a particle of proof that the assistant superintendent ever promised that the United States should pay for the stone delivered any greater sum than $5.00 per cubic yard. If he had so promised it could not benefit the claimant * * *."
> (p. 697) "Express stipulations cannot in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned or has been varied by the consent of the parties."

In other words, this provision might have been abandoned, but not by an agent with no authority to bind the Government. The rule was made even clearer in a similar case arising on appeal from the Court of Claims, *United States v. Barlow*, 184 U. S., 123. In that case the claim was for extra work ordered by the Secretary of the Navy in the course of building a dock. Mr. Justice McKenna spoke for the Court (p. 136):

> "It is further contended by the Government that the experiment with the water-jet system was a 'change or modification' of the contract, and because not agreed to in writing by the parties that the expense incurred by the contractors in making the experiment cannot be recovered."
>
> "If both contracting parties were individuals, it would easily be seen that subdivision seven was inserted in the contract for their benefit, to be insisted upon or waived as to them might seem best. What precluded that freedom and useful power to the Government? If not precluded it certainly could have been exercised and, as we have seen through the Secretary of the Navy. If the power to insert the provision in the contract or to omit it was given, the power to dispense with it was also given, unless

it was necessary to be inserted, and could not be dispensed with, on account of some injunction of the law. Such injunction, as we understand counsel, is claimed by virtue of section 3744 of the Revised Statutes, which requires the Secretary of the Navy to cause all contracts made by his Department to be reduced to writing and signed by the contracting parties with their names at the end thereof. It is certainly disputable if the requirement of the section applies to alterations, which may become necessary in the progress of work regularly conducted under contract. And this court has held that the requirements of the section did not preclude a recovery for property or services 'as upon an implied contract for a *quantum meruit*.' *Clark v. United States*, 95 U. S., 539. But we are not required to decide on this record the question suggested."

It would be tedious to burden this brief with further instances. One case remains for serious consideration, *Plumley v. United States*, 226 U. S., 545, on which the Court of Claims relied in the present controversy. In that case the Government officer in charge ordered certain work done, insisting that it was a part of the contractor's obligation. The contractor protested but the officer remained firm in his interpretation of the contract. The work was done and a claim brought for extra work. The claim was denied and Mr. Justice LAMAR used the following language:

"3. The other items for extra work were properly disallowed. The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded $500. In every instance it was necessary that the change should be approved by the Secretary. There was a total fail-

> ure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract."

That case has been followed in *Kilmer v. United States*, 48 Ct. Clms. 180, and *Daly and Hannan Dredging Company v. United States*, 55 Ct. Clms. 1. It is plain that the case is readily distinguishable from the facts presented on this appeal. In that case the Government insisted that the work be done as part of the contract obligation; in this case the Government officials clearly recognized and admitted that the work was no part of the contractor's duty. There the order was made by the superintendent alone; here the order was made by the contracting officer and approved by the Secretary of War, and every other official to be found along the "usual channels" and payment was ordered. In short, in that case and in the cases relying on it there were no facts tending to show that the provisions of the contract had been abandoned and superseded; in this case there are such facts.

The principle then is plain. When a Government representative, clothed with full authority to make contracts, undertakes to disregard contract provisions and make oral arrangements as to the same subject matter, the contract provisions are superseded, especially where the contractor furnishes a consideration. The facts stated on this appeal seem sufficient to indicate a total abandonment of the contract, as in *Howard v. Wilmington, etc., Railway Company*, 1 Gill (Md.) 311. They

may, however, be construed as amounting simply to an abandonment of those provisions which restrict claims for extra work. (Cf. *United States v. Smith*, 256 U. S., 11, in which case the contractor had agreed to dredge a channel of certain specified materials. New materials, much more difficult to dredge, were encountered, which the engineering officer arbitrarily classified with the materials described by the specifications, ignored the protest of the contractors and their request that a new price be fixed therefor, and required them to proceed under threats of declaring them in default. Here it was held that clauses in the contract similar to those which have been set forth in our case were "inapplicable" and that the contractors were entitled to recover from the United States the cost of excavating the materials not covered by the contract.) Whatever the theory, the result is the same—the provisions of the written agreement are inapplicable. *Salomon v. United States*, 19 Wallace, 17.

If the facts in this case do not show such an abandonment, it may well be questioned what could. The authority of the contracting officer and the Secretary of War to abandon the contract cannot be questioned. (See *United States v. Barlow*, 184 U. S., 123, 135.) Even if their oral agreement had been required by statute to be in writing, the contractor would have been entitled to recovery on a *quantum meruit* basis. *Clark v. United States*, 95 U. S., 539. Further, their acts were certainly unequivocal indications of intent to abandon as were the direct expressions to be found in the report of the War

Department in this case (See Exhibit "B"). Every obstacle that organizing ingenuity and administrative exigencies contrive to put in the path of claims against the Government, were successfully passed. It is true that the Chief of Engineers never approved the price and quantity of the work before it was done, but this was for the plain reason that neither the price nor the quantity of the work could be determined until it had been completed. Moreover, if Article 6 was the provision applicable to this case, then no such approval was required.

The principles of law seem to us established, nor do the considerations of a wise policy conflict. These provisions are aimed to protect the government from the depredations of unscrupulous contractors and corrupt officials. To serve this end they should undoubtedly be given full effect; but when it is clearly shown that the provisions were disregarded by responsible officials with plenary power to make such contracts in the first place, the policy behind the provisions is placated, and the obvious justice of the contractor's claim must prevail. To employ the classic figure, provisions of the contract should be a shield to the Government, not a sword to the contractor.

CONCLUSION.

The facts show that the contractor did work for which he has not received anywhere near a just compensation. What that compensation should be is determined by the decisions. See *Freund v. United States*, 260 U. S. 60, 70;

Cotton v. United States, 38 Ct. Clms., 536. We submit, therefore, that the facts found by the Court of Claims fully warrant this court in remanding the cause to the Court of Claims for a finding as to the reasonable cost of the work. That in any event so long as the questions asked in the contractor's motion to remand are unanswered, the case cannot properly be disposed of. We, therefore, respectfully request this court to remand this case to the Court of Claims to make such further findings as may seem proper.

Respectfully submitted,

HORACE S. WHITMAN,
Attorney for Appellant.

WILLIAM L. MARBURY,
CHARLES CLAGGETT,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1924

SANFORD & BROOKS CO., APPELLANT
v.
THE UNITED STATES
No. 175

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO REMAND

At the time the brief of the United States in this case was necessarily printed, to comply with the rules of this Court, the Brief of the Appellant had not yet been received. When received it is accompanied by a Motion to Remand to the Court of Claims for further findings. *The principal portion of the claim has been abandoned.* The lesser portion, while not expressly abandoned on the present Findings, inferentially seems to be conceded not to be sufficiently supported by them. The contention is that such further findings as are sought might support this portion of the claim.

We submit that there is no justification for this motion. There is nothing indefinite about the findings nor does it appear from anything in the record that any material fact was not found below. Upon no other ground can such a motion be sus-

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tained under any of the Court's decisions, including those cited by the appellant. Moreover, if the facts contended for were found the legal result would not be changed. Consider them *seriatim*.

The only possible inference from the Findings as they stand is that the work which was done outside the lines mapped out in the specifications was nevertheless done under the contract and was, if anything, done as an "extra" thereunder, for which provision was made in the contract, with which provision the appellant did not comply. Appellant made no written protest, notwithstanding the provision of the contract that no claim would be allowed for such extra work in the absence of a written protest. Now appellant asks (1) that there be a finding as to whether it did not make an oral protest, and (3) whether it did not orally protest against being paid at the contract price, and (4) whether it did not present a claim on some other basis, which was "entertained." Suppose these interrogatories were all answered in favor of appellant, if the extra work was done under the contract, the legal result could not conceivably be affected. Appellant could still recover for extra work only in the manner provided for by the contract.

As for proposed additional Finding No. 2, that the appellant was directed by the contracting officer to continue outside the mapped out lines because it would have been impracticable and more expensive to return at once to the contract lines, that contains only one element not in the present Findings. The

Findings now are (No. III) that the Contracting officer directed the work to proceed along the wrong location until it again coincided with the lines appearing on the map. The only additional element asked is the reason for this decision. The reasonable inference from the facts found is that the only practicable and economical thing to do under the situation which had developed was to come back to the channel as mapped out, not abruptly, but so as to preserve an unbroken channel bank. The only material fact is certainly the one found, namely, that the direction was given. Why it was given seems obvious, but in no sense does it qualify the legal result proceeding from the facts involved.

And certainly it is immaterial that long after the extra work was done the Judge Advocate General of the Army wrote an opinion that it should be paid for *quantum meruit* and that the Secretary of War directed a settlement on that basis (Proposed Additional Finding No. 5). That all of this transpired long after the extra work was done appears on the face of the opinion of the Judge Advocate General. See page 25 of Appendix of Appellant's Motion to Remand.

Proposed Additional Finding No. 6, the reasonable cost to appellant of the work done outside the mapped lines, would, of course, be material, if appellant was entitled to recover *quantum meruit*, but it is not material otherwise, and was properly, therefore, omitted from the Findings.

As for the proposed Findings 7 and 8, they are fully covered by the Findings as they stand.

The theory that under the present Findings, or under the present Findings even if supplemented as appellant urges, the work outside the mapped lines was not done under the contract is untenable. The thing contracted to be done was the dredging of a channel in Broad Creek, Maryland. The specifications mapped out the channel to be dredged. That was the channel which was dredged. By a mistake, however, at one point along the channel the exact line appearing on the map was missed. Certainly until that fact was known it was within the intention of both parties to the contract that the contract prices governed. When the error was discovered, then the erroneous channel line had to be followed until the original line was met again. But the project contemplated by the contract was unchanged. The contract covered it. If extra labor was involved, then the contract provided how claim for extra compensation might be made. Certainly it is wholly inconsistent with the Findings to say that the contract was abandoned, that the situation was the same as if there were no contract, when by the Findings it appears that the appellant was paid at and accepted for the work the contract rate.

We respectfully submit that the Motion to Remand should be overruled and the judgment below affirmed.

JAMES M. BECK,
Solicitor General.
MERRILL E. OTIS,
Special Assistant to the Attorney General.

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